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THE RESTATEMENT OF RESTITUTION

*R. M. Jackson**

The *Restatement of Restitution* rests upon a definite conception of the classification of obligations. This can be deduced from the volume itself, and I was preparing an article pointing out some of the implications of the arrangement of the material, but this is now unnecessary since the Reporters to the Committee on Restitution have published an account of their views[1] and we can rely upon positive statements rather than inferences. What is recognized is a tripartite division into contract, tort and restitution. Contract is what has been promised to the plaintiff or to another for him; trusts (other than constructive trusts) fall within this category of voluntary undertaking. Tort is based on the premise that a person has a right not to be harmed by another; "the accent is upon wrong and harm."[2] The measure of the remedy for contract is that the plaintiff is to be placed (as far as reasonably can be done) in as good a position as if the promise were performed, whilst in tort the compensation should be substantially equivalent to the harm done. The third category is restitution on the basis of unjust enrichment.

It is singularly difficult to bring an open mind to bear upon the common law. Unless a man has some legal training he will not be able to handle the material, and when he has acquired the requisite technical skill he will have absorbed a good dose of traditionalism. If we make an attempt to stand outside our legal setting and consider the content of our law of obligations as a set of isolated rules that have to be arranged into an intelligible order, should we adopt the tripartite grouping accepted by the *Restatement?* I very much doubt whether we should find it acceptable. On this scheme, contract and tort are marked off by the source of the obligation, whilst the third group is distinguished by the remedy that is available: the trichotomy is not contract, tort and unjust benefit, but contract, tort and restitution. It is theoretically as unsound as a classifica-

*Lecturer in Law in the University of Cambridge. Author, THE HISTORY OF QUASI-CONTRACT IN ENGLISH LAW (1936). Mr. Jackson is now engaged in preparing a treatise on modern English law of Quasi-Contract.—*Ed.*

[1]Seavey and Scott, *Restitution* (1938) 54 L. Q. REV. 29.

[2]*Id.* at 32.

tion of birds and mammals by their structure and fishes as things that swim in water, although the student of Blackstone who knows that whales are "royal fish"[3] might perhaps find that this new science confirms the wisdom of the common law. If we classify obligations by their source it is likely that contract would stand out as a clearly marked heading. Tort would perhaps form one heading, although liability for fault and liability without fault might seem different conceptions. We might make a category called unjust enrichment, but its contents would be unlikely to agree with the scheme of the *Restatement*. A cotton broker who buys cotton and sells it again in the ordinary course of his business is liable in tort in conversion if his vendor had no title to the goods.[4] He may also be sued in assumpsit on waiver of tort, when the remedy (according to the *Restatement*) is restitutionary, the measure of damages being the broker's sale price. The only "unjust benefit" the broker may have received is his profit or commission, but this is irrelevant since he is equally liable whether he made a profit or a loss on the transaction. On the other hand, there are many cases of "unjust benefit" where there is no duty of restitution. He who receives possession and title to goods under a sale and refuses to pay the price appears to have an unjust benefit, yet his duty is to pay the contract price, not restore the goods: reverse that, and he who has paid the price but not got the goods may have a restitutionary remedy as an alternative to action on the contract. If we tried making a classification on the remedies available, we might well decide that restitution is "a word which has a connotation of the right to recover back something which one once had."[5] Return of a specific object is clear enough, and, despite the fact that you cannot restitute to a man what he never had, it is reasonable to use the term to cover replacement of one sum of money by an equal sum. The idea of fungibles does not extend beyond money. If *A* wrongfully destroys the goods of *B*, the only possible judgment against *A* is for payment of money; even when similar and indistinguishable goods are procurable the court will not order *A* to hand to *B* goods equal in quantity and quality to those converted. If *A* had wrongfully sold the goods, waiver of tort would result in the goods being "recovered back" as cash, which is surely better called compensation than restitution. If receipt of money can be "restitution" of a unique chattel that has been lost, then why is not damages for loss of a limb called

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[3] 1 Bl. Comm. *223.

[4] Hollins v. Fowler, L. R. 7 Q. B. 616 (1874), 7 H. L. 757 (1875).

[5] Seavey and Scott, *supra* note 1, at 29. This is the common law usage of the word. See Jacob, Law Dictionary. Ejectment and the restitution of stolen goods as the result of criminal proceedings were the only common cases of specific restitution. Power to order specific restitution of property was given to English Courts by the Common Law Procedure Act, 1852.

restitution of the limb? The idea of restitution becomes just as strained when the plaintiff is following trust property under a constructive trust; in fact the *Restatement* uses the term "re-imburses"[6] to describe the duty that arises in certain cases.

If it is true that the tripartite division would hardly be adopted by the enquirers that are postulated, it is pertinent to ask what they might adopt. Some would perhaps give up the task by resorting to enumeration under some heading that was a synonym for "oddments."[7] The only thing I feel sure about is that they would all adopt different schemes, simply because the search has been assigned no definite purpose. There cannot be a "most satisfactory" arrangement unless we know the purpose for which the arrangement is to be made. Nor can there be any "scientific" classification without considering the ends to be served. Men may be scientifically classified by the shape of their skulls, their pigmentation, incomes or other characteristics, but for the purposes of finding their phone numbers it is more convenient to have their names arranged alphabetically. The primary reasons why we must arrange our law are that students must have it in some assimilable form and that practitioners must be able to find what they want. Although these are different requirements they tend to come to much the same thing in the long run. The limiting factor is largely *stare decisis;* although American lawyers have a far freer hand with reported decisions than is allowable in England, a basis of case-law is of the essence of the common law system. Exposition of law must fit the data, and at the same time proceed in such a way that the data remain intelligible. When Year Books are approached by those who know only the modern legal schemata they find merely chaos; a generation brought up on some new classification of obligations might find eighteenth and nineteenth century law reports very difficult to handle. Changes of classification and the meaning of words have of course taken place in common law,[8] and that process will doubtless continue. Perhaps we do need a new start,[9] but an exposition of existing law must be sufficiently traditional to be intelligible to contemporary lawyers. The emphasis is on *sufficiently,* leaving a fair field for progressive treatment.

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[6]RESTATEMENT, RESTITUTION (1937) §§ 209, 210.

[7]The classification ascribed to Gaius in the Digest, contract, delict, *ex variis causarum figuris,* D.44.7.1.pr., has had less influence than the more famous contract, quasi-contract, delict, quasi-delict.

[8]Year Books are frequently cited in seventeenth century reports, and then far less frequently in the eighteenth century; legal thought and modes of expression had changed. I have discussed the career of the word "contract" in *The Scope of the Term 'Contract'* (1937) 53 L. Q. REV. 525.

[9]To a student of the history of the common law it must often appear that those who praise the common law for its adaptability to social needs are engaged more in wish fulfilment than in careful enquiry.

The *Restatement of Restitution* represents a wise and progressive handling of matters that are one subject because of historical causes. Part I, Quasi-Contract, is essentially general assumpsit for cases that are outside contract in the present connotation of that word. Keener[10] included assumpsit on a judgment, or for a statutory, official or customary duty; the *Restatement* follows Woodward[11] in omitting these topics, but for the rest the connecting link is a form of action now generally abolished. It is a commonplace that the action of assumpsit was a more satisfactory remedy than any other form of action. If actions on the case in tort had not been subject to survivals such as *actio personalis moritur cum persona* there would have been no reason for practitioners to prefer an extension of assumpsit rather than an extension of tort. *Pinchon's Case*[12] in 1611 has had a good deal to do with the preference shown for a remedy sounding in contract. If we take the quasi-contracts of the *Restatement* it will be found that they fall into three groups: (1) Where there is no contract, that is, no promise (express or implied from the facts), and no tort within the old forms of action; the recovery of money paid by mistake is an example. (2) Where there is a contract on which special assumpsit would lie. Here the use of general assumpsit was primarily to secure the advantage of pleading a "common count." Some of these cases are included in the *Restatement of Contracts,* but Chapter 4 of the *Restatement of Restitution* contains examples. (3) Where a tort has been committed, but (a) general assumpsit offered procedural advantages or a different measure of compensation, or (b) no action could be brought in tort because the tortfeasor was dead or the period of limitation in tort had expired or through some other rule governing tort actions and not applicable to assumpsit. Examples will be found in Chapter 7. The advantage to be gained by general assumpsit instead of special assumpsit is meaningless under a system of reformed pleading. Assumpsit instead of tort will be important so long as archaic rules like *actio personalis moritur cum persona* continue to exercise their evil influence. I do not know of any sound reasons for retaining any of the rules that prevent an action in tort but allow an action in contract for what is substantially the same cause of action; they are merely survivals of a concept of tort as being next door to crime.

Were these actions thought of as being restitutionary? That of course depends on what is meant by "restitution." If this word is used to mean the restoration of something that the plaintiff

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[10]KEENER, QUASI-CONTRACTS (1895).
[11]WOODWARD, QUASI-CONTRACTS (1913).
[12]9 Co. Rep. 86b, 77 Eng. Rep. 859.

previously had, then I do not think that they would have been called restitutionary. When the plaintiff was out of pocket in a definite sum of money and could claim that exact sum from the defendant, he would doubtless think in terms of restitution, but it was not because of any such theory that his lawyer would claim a liquidated sum. That the claim was generally for liquidated and not unliquidated damages had its historical causes. The action of debt lay for a sum certain in money, and general assumpsit as the heir to debt normally involved a claim for a liquidated sum. It is very doubtful whether debt was ever thought of as restitutionary,[13] and the lawyers who developed assumpsit certainly understood the difference between "I own" and "I am owed." When a man has received money unjustly it does not ordinarily make any difference whether we say he must restore, restitute, replace or repay *the* money or *a sum* of money. When an infant has obtained a benefit by a contract absolutely void by statute, equity will decree specific recovery when possible, but restitution and repayment are here sharply differentiated.[14] Lawyers are often slack about their phraseology until some point arises where precision is essential. Further, it seems that there may be some claims in assumpsit of a quasi-contractual nature where the remedy sought is unliquidated damages.[15] The key has been the judicial extension of a form of action to meet claims that are widely equitable, without any nice regard for whether the judgment restores, replaces or compensates.

We have then the fact that these cases are grouped together historically. The men who fashioned the action spoke in terms of implied promise and implied contract; nobody has suggested that they consciously based their proceedings upon restitution as contrasted with general damages. If we continue to accept this grouping, we must either base our argument upon historical continuity or else find something else. A purely traditionalist treatment is out of the question, if for no other reason than the confusion it introduces into the concept of contract. The most thorough modern analysis for English law arrives at the conclusion that quasi-contract signifies "liability, not exclusively referable to

[13]Introductory matter to RESTATEMENT, RESTITUTION (1937) 5, says that debt was restitutionary; I do not know of any basis for this view, except that the writ was a *praecipe*; see PLUCKNETT, CONCISE HISTORY OF THE COMMON LAW (2d ed. 1936) 324, 325. The Restatement also says, at p. 5, that account was restitutionary and "if successful, resulted in the recovery of a sum of money which had been received by a fiduciary and not accounted for." The common law action of account lay to make a defendant bring in his accounts before auditors; no money could be recovered by this action; if the auditors found that anything was due to the plaintiff then the plaintiff had to bring debt if it was not paid.

[14]Leslie v. Shiell, [1914] 3 K. B. 607, 618.

[15]WINFIELD, PROVINCE OF THE LAW OF TORT (1931) 186–188.

any other head of the law, imposed upon a particular person to pay money to another particular person on the ground of unjust benefit."[16] This of course presupposes that other heads of the law can be adequately defined; the negative character of the definition is prominent, but unless a better definition is forthcoming it may well be accepted in England. The *Restatement* is based upon the view that all these cases are subject to one unitary principle, called restitution. If this view is sound, it represents the greatest advance in the classification of obligations that has occurred for many years. I have pointed out above that if the word "restitution" is used in its common meaning (which also happens to be its traditional legal meaning) the remedies for quasi-contract are usually not restitutionary. The old meaning is dropped, and it is now necessary to make the word carry a special connotation:

> "Restitution, as the word is used in the Restatement of this Subject, means restoring to a person property transferred by him to another or property of his acquired by another, or paying to him the value of such property or the value of services rendered by him. It implies both a loss by him and a receipt of something by another, although in some cases the amount of loss and the value of that which was received are not equal."[17]

If lawyers choose to give the word this meaning, or any other meaning, then it will bear that meaning as a legal term. Within this definition, many tort actions are for restitution of an unjust enrichment,[18] although it is considered that in the tort actions the essence is the wrong done rather than the unjust enrichment. The difficulty I find with this connotation of restitution is that it is compendious rather than analytical. In effect, the process seems to be this: the historical grouping is taken, the allied equitable topics are added, and the remedies and measure of monetary payments are set out; the remedies (a varied assortment) are then called restitution. Does the unitary principle of restitution really mean more than that anything a court will do in an action resting on the principles of general assumpsit (and equitable relief in analogous cases) is now to be called Restitution, whilst the same type of remedy in an action in contract or tort is not called restitution? If it is true that Restitution is no more than a compendious name for the products of a somewhat miscellaneous historical evolution, it is a great deal better than describing a subject as the common counts in assumpsit as modified by legal reform, minus those counts that are more conveniently treated elsewhere, plus analo-

[16]WINFIELD, *op. cit. supra* note 15, at 119 *et seq.*, where other definitions are discussed.

[17]Introductory matter to RESTATEMENT, RESTITUTION (1937) 522.

[18]*Id.* at 523.

gous equitable remedies. I hope that I am wrong in failing to see that restitution is really a unitary principle, for some such principle might give greater cohesion to the subject than the notion of unjust benefit. But at present I can only see Restitution as a somewhat arbitrary title, inferior to Unjust Enrichment in significance but having the merits of the word "restitutionary" as an adjective instead of the lengthier phrases necessary if we speak in terms of unjust enrichment.

Part I also includes claims both at law and in equity, without any distinction being drawn between the two cases. For technical reasons I think that an English lawyer would want to know whether law or equity was to be invoked, but the treatment of them both as part of one topic seems essential for modern requirements. The essence of equity has been and still is that it is supplemental to the common law; "in connexion with every principle of law a student should get into the habit of asking himself, 'Has equity any contribution to make on this point?' "[19] An unnecessarily sharp distinction in England between the common law and the chancery bar has led to too specialised treatment; for instance, some works on contract are woefully deficient on the principles of equity that must be known for the proper handling of contract. The meagre English authorities on quasi-contract exclude equity, and are so much the poorer.

Part II, consisting of constructive trusts and analogous remedies (equitable lien and subrogation), is the part of the work that may bother the more orthodox English lawyer. English lawyers tend to think of trusts as forming a separate and inviolable field that is best kept clear of the law of obligations,[20] and the notion of a constructive trust as a remedial institution seems to cause some mild alarm.[21] The fear is that the "trust label" should not be tied on to "sets of circumstances which have little or nothing in common with the real trust concept": it is perhaps relevant to ask where the true trust concept would have got to if equity had not invented "constructive notice," which has little or nothing in common with the real notice concept. Professor Corbin's[22] attempt to show that English lawyers really practise this technique has not lead to any general recognition of the device. The standard English works on

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[19]Hanbury, Essays in Equity (1934) 63, repeated in the Preface to Modern Equity (1935).

[20]Winfield, *op. cit. supra* note 15, at 115.

[21]Book Note (1932) 48 L. Q. Rev. 586, and Hanbury, Modern Equity (2d ed. 1937) 34.

[22]Corbin, *Contracts for the Benefit of Third Persons* (1930) 46 L. Q. Rev. 12.

trusts[23] do not contain any account of how the authorities stand on this topic. I agree with Professor Corbin that the notion of constructive trusts may serve to extricate English law from some of its more tiresome limitations;[24] a practitioner who wanted to try his luck with such a device in the English courts should study the American authorities. Once it is admitted that constructive trust is purely remedial, then its place should be alongside that part of the law that it supplements. I can see nothing against this policy, and everything in its favour.

The mere collection together of material in an accessible form is a worthwhile occupation, but for a work like this it is important to consider the influence it is likely to have on the development of the law. I do not mean the number of definite paragraphs that may be approved by the courts, but the tendencies that may be produced or encouraged by the standpoint that is adopted by the authors. Thus, tort can be stated as a general principle not to harm others or as a number of specific torts; quite apart from the correctness of either view is the consideration that the former view is far more likely to lead to satisfactory development of the law. With considerable temerity I make these suggestions about the effect that the *Restatement of Restitution* may have:-

1. The essence of this subject is the application of equity in the wide sense of that word. This was recognised by Lord Mansfield, and, although his phraseology is out of fashion these days, it will be a poor outlook for the future if a wide principle gets submerged beneath a mass of specific rules because we are afraid that talk of justice must be "well-meaning sloppiness of thought."[25] The stress should be on the underlying principle: "A person who has been unjustly enriched at the expense of another is required to make restitution to the other."[26] The detailed rules may be a strait-jacket if they are thought of as comprising the subject rather than as illustrating the main principle.

2. Technical equity, anyway in England, is more flexible than common law. The inclusion of constructive trusts should encourage the view that if the main principle is held up in one direction it can be set right in another.

3. The natural enthusiasm of men for their own subject may tend to keep topics under the heading of Restitution when they

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[23]GODEFROI, DIGEST OF THE PRINCIPLES OF THE LAW OF TRUSTS AND TRUSTEES (3d ed. 1907); LEWIN, LAW OF TRUSTS AND TRUSTEES (11th ed. 1904); UNDERHILL, LAW RELATING TO TRUSTS AND TRUSTEES (6th ed. 1904).

[24]Sinclair v. Brougham, [1914] A. C. 398, shows that limitations derived from the history of assumpsit may be circumvented by an equitable remedy. The Cambridge Law Journal for 1938 will contain an article by Lord Wright on this case.

[25]Scrutton, L. J., in Holt v. Markham, [1923] 1 K. B. 504, 513.

[26]RESTATEMENT, RESTITUTION (1937) § 1.

could be more conveniently included under some other head of the law. Claims based on a total failure of consideration are thought of as part of the law of contract, and are included in the *Restatement of Contracts*. Wherever the remedy is alternative to a claim in contract or tort there is something to be said for treating the quasi-contractual remedy under contract or tort, for in such cases the usual mental process is to start from the basis of a contract or tort and then consider what redress is available.

4. The concept of restitution is, as I have indicated above, not wholly satisfactory as an analytical basis for the topics in question. The theory can of course be saved by defining restitution so as to include much that is at present opposed to it, or by adding notional or constructive restitution. The great pleasure at seeing "constructive contracts" that are not "contracts" properly exorcised will be lessened if we have in their place restitution that is not restitutionary and restitution that does not come within Restitution.[27] Too much insistence on restitution may lead to undesirable results. Legal concepts derived from history have a habit of becoming Immutable Ideas fixed in the order of nature. A survival (still alive in England) such as the Roman rule that one not a party to a contract cannot sue on that contract, may come to resemble an inborn characteristic.[28] The creatures of the law are tractable when we regard their characteristics as conditioned, but if we ascribe to them inborn characteristics they become as singular as real animals at common law: it is by law not the nature of sheep and cattle on the highways of England to obstruct traffic,[29] whilst elephants are prone to attack human beings and bulls are not.[30]

The writer on, say, contract or tort has existing full length treatises to indicate the accepted confines of his field. The vol-

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[27]Under the older nomenclature, a money judgment was never restitutionary because the plaintiff recovered what he was owed and not what he owned, whilst ejectment, replevin (and trover in later law) were restitutionary. Now we are to say that restitution covers getting back what one never had, and that ejectment, *etc.*, may be restitutionary but are not Restitution for the Restatement.

[28]The proposition that a third person might sue on a contract to which he was not a party was rejected in Tweddle v. Atkinson, 1 B. & S. 393, 121 Eng. Rep. 762 (1861), with the comment that it was a "monstrous proposition." LANGDELL, SUMMARY OF THE LAW OF CONTRACT (1880) 79: "This [rule that only the parties may sue] is so plain upon its face that it is difficult to make it plainer by argument." In Dunlop v. Selfridge, [1915] A. C. 847, 853, it is "fundamental . . . that only a person who is a party to a contract can sue on it." Contract is here given a fixed nature, independent of the characteristics that a legal system gives to it.

[29]Heath's Garage, Ltd. v. Hodges, [1916] 2 K. B. 370.

[30]Filburn v. People's Palace Co., 25 Q. B. D. 258 (1890); Hudson v. Roberts, 6 Ex. 697, 155 Eng. Rep. 724 (1851).

ume on Restitution is a pioneer work. It is because of this, and because it is an excellent piece of work, that it ought to receive very careful, and very critical, attention. I have expressed little of the admiration I feel for the labours of the two Reporters, for the merits of the book are manifest.

EFFECT OF EXTRA-STATE MARRIAGE CEREMONIES

*Charles W. Taintor, II**

Introduction

If the ideas of men in the various parts of the civilized world with respect to the classes of persons to, or between, whom marriage should be forbidden, were uniform it would be necessary, in any given case, merely to inquire whether the requisite means of manifesting assent to becoming married had been used.[1] Since the sensibilities, usually moral but sometimes economic, of the inhabitants of various states[2] are injured by the idea of marriages between certain classes of persons; since these sensibilities are protected by the states either by decisions, declaring void marriages of the abhorred types, or by statutes prohibiting or declaring void such marriages; and since, especially in these days of rapid and easy travel, many persons go through the marriage ceremony in some state with which their only connection is that the marriage was there celebrated, it is necessary to determine under what circumstances the broadly stated doctrine of the common law—a marriage valid by the law of the state of ceremony is everywhere valid[3]—will be disapproved by the courts and the validity of the marriage referred to other system or systems of law with which the parties are most closely connected.[4]

This inquiry is the more necessary because, while there is language in a few of the cases to the effect that the courts should

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[1]It is not within the scope of this paper to enter into an inquiry as to the law applicable to the determination of the formal validity of the ceremonial or other method of contracting a marriage. It is, therefore, to be taken, throughout this paper, as postulated that the formalities have been completed in due form under the law thereto applicable and inquiry will be addressed solely to the question of the effectiveness of the ceremony to serve as a foundation for the creation of the status of marriage.

[2]The word "state" will be used throughout this paper to indicate a "jurisdiction" in the territorial sense, and capitalized "State" to indicate a State of the United States of America.

[3]A more accurate statement of this doctrine is—The status of marriage will be created by the law of the state most concerned provided the state in which the ceremony is performed would not refuse to create the status if its law alone were applicable and provided that a union between the parties would not be abhorrent to the people of the state most concerned. The traditional statement of the doctrine, thus, represents a declaration that a marriage is *prima facie* valid if a valid ceremonial form is used.

[4]To the effect that this system is the law of the *intended family domicil*, see CHESHIRE, PRIVATE INTERNATIONAL LAW (1935) 161; and that it is the domicil or domicils of the parties, see 2 BEALE, CONFLICT OF LAWS (1935) § 121.2.

reach different results depending upon the purpose of the attack upon the validity of a marriage,[5] no case has been found in which the decision was based expressly upon any such consideration and there is little evidence that the courts have been at all influenced by the reason for which invalidity is asserted. The attitude appears to be, rather, that a given marriage, considered *in vacuo,* is valid or void and that legal results flow inevitably from the existence or non-existence of the status.[6]

Circumstances Leading to the Application of a Law Other Than that of the Place of Ceremony

In General

As a valid ceremony is, *prima facie,* the foundation of a valid marriage, it is evident that some strong policy of the state most interested in the purported family as a family must be offended by the union of two persons in order to require or justify a refusal of that state to create the status.

Cases of this nature fall into two classes: (1) Marriages deemed contrary to the law of nature as generally recognized in Christian countries; and (2) Marriages which the local law-making power has declared, in express terms or by necessary implication, shall be allowed no validity. The first class includes incestuous[7] and polygamous unions. The second class includes cases coming within statutory prohibitions embodying distinctive state policies protecting the morals or good order of society.[8] Within this second class must be placed marriages between persons related by consanguinity or affinity, but not within the generally

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[5]See Woodward v. Blake, 38 N. D. 38, 164 N. W. 156, 159 (1917), where Bruce, C.J., dissented upon the ground that an offensive marriage ought, perhaps, to be held valid to protect the rights of innocent children, but should be held void where one of the parties claimed property rights arising from it.

See also Newman v. Kimbrough, 59 S. W. 1061, 1064 (Tenn. Ch. App. 1900), *aff'd orally,* Tenn. Sup. Ct., Nov. 3, 1900. *Cf.* Maillefer v. Saillet, 4 La. Ann. 375 (1849); Guillebert v. Grenier, 107 La. 614, 32 So. 283 (1902).

[6]See Campbell v. Crompton, 2 Fed. 417 (C. C. N. Y. 1880); Pennegar v. State, 87 Tenn. 244, 10 S. W. 305, 306 (1889); Scrimshire v. Scrimshire, 2 Hag. Con. 395, 417, 161 Eng. Rep. 782, 790 (1752).

[7]In order to establish incest by the common consent of Christian states it appears that the parties must be in the direct line of ascent and descent or be brother and sister. See Commonwealth v. Lane, 113 Mass. 458, 463 (1873); Story, Conflict of Laws § 104.

[8]See Brook v. Brook, 9 H. L. Cas. 193, 226 (1861): "But if the contract of marriage is such, in essentials, as to be contrary to the law of the country of domicil, and it is declared void by that law, it is to be regarded as void in the country of domicil, though not contrary to the law of the country in which it was celebrated."

recognized incestuous degrees,[9] remarriages of divorced persons,[10] miscegenous marriages,[11] marriages of persons within age[12] and marriages prohibited by statutes concerning health or eugenics.[13]

Our purpose is to determine what types of marriages are abhorrent to the sentiment of any particular state to such a degree that the state will refuse to create the status, wherever the ceremony may take place; and those which are considered sufficiently evil to require such a refusal only if the ceremony is within the state.

Particular Prohibitions

(*a*) *Consanguinity.* The cases of consanguineous marriages will be first discussed. There may be seen here a sentiment generally offended by the marriage of uncle and niece or aunt and nephew and, to a less degree, by the intermarriage of first cousins; but, even where a statute declares such marriages void, there is a tendency toward leniency.[14] The statutes of Pennsylvania show clearly the

[9]Twenty States prohibit, declare void, or declare incestuous, marriages between uncle and niece or aunt and nephew; twenty-two—between first cousins; five—between persons more closely related than second cousins; and one—between second cousins. (Note: This total is deceptive as North Carolina prohibits the marriage of double first cousins and declares void the marriage of persons more nearly related than first cousins; Pennsylvania prohibits and declares void the marriage of first cousins and declares incestuous the marriage of uncle and niece or aunt and nephew; and Idaho takes the same position as Pennsylvania.)

[10]Nine States control this matter by giving decrees *nisi* for six months or one year. Eleven States prohibit the remarriage of either party for a period of six months or one year from the date of final decree; two States provide that the marriage is terminated except that neither may remarry within six months or one year; and one State that the marriage shall not be dissolved as to remarriage for six months.

Two States forbid the remarriage of the party, divorced for adultery, with the paramour; four forbid the remarriage of the guilty party; three provide that the marriage shall not be dissolved as to the guilty party for various periods in cases of divorce for adultery.

[11]Prohibitions of miscegenous marriages are found in the statutes of thirty-two States. (The States in which this type of prohibition is not found lie in the northeastern section of the United States.) All but one of these statutes declare miscegenous marriages void or felonious. The prohibitions vary, all covering the intermarriages of whites and negroes, some adding Indians, some Mongolians and some practically all colored races.

[12]The ages with regard to men and to women, vary from 21 to 15 and from 21 to 12 respectively where regulated by statute. In a number of States persons between the lower age and the higher may be issued a license only with the consent of parent or guardian.

[13]These statutes commonly prohibit the marriage of any person who is epileptic, afflicted with some mental defect or with tuberculosis in the infectious stage, or with a venereal disease, or some combination of these characteristics.

[14]In Fensterwald v. Burke, 129 Md. 131, 98 Atl. 358 (1916), on the ground that the word "void" in the statute had been construed to mean "voidable" [Harrison v. Harrison, 22 Md. 468 (1863)], the court held that the marriage was not incestuous according to the common consent of Christian nations, nor

type of expression which the courts treat as intending to declare absolutely void all consanguineous marriages within their prohibition. In that State, marriages between persons as closely related as uncle-niece or aunt-nephew are declared void to all intents and purposes[15] and sexual intercourse between persons within that degree is punished as incest,[16] while the intermarriage of first cousins is declared unlawful and void.[17] A divorce will be decreed, in that State, in the case of the extra-state marriage of uncle and niece;[18] but will be refused to first cousins.[19] Under statutes declaring consanguineous marriages incestuous, in other States they are held void *ab initio*,[20] whether the marriage is in question in the courts of the State to which the parties looked from the creation of the status or in those of another State.[21]

Turning to a consideration of the policy of the several States as shown by their statutes, and taking note of the fact that the general principle of the conflict of laws as to marriage is that a marriage which is valid at the place of ceremony is everywhere valid, it must be held that in order to show an abhorrence of consanguineous marriages which are not within the commonly accepted incestuous degrees the applicable statute should show clearly that the intention of the legislator was to declare such marriages void, though contracted without the State, between persons who intend to live therein. Statutes which offer a modern parallel to those considered in *Brook v. Brook*[22] and express the same attitude as those statutes[23] clearly show the requisite intention to re-

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within the class declared void.

Accord: Stevenson v. Gray, 17 B. Mon. 193 (Ky. 1856) (uncle-niece); Tyler v. Adams, 40 App. D. C. 100 (1913) (step-father—step-daughter); Leefield v. Leefield, 85 Ore. 281, 166 Pac. 953 (1917) (first cousins); Schofield v. Schofield, 51 Pa. Super. Ct. 564 (1912) (first cousins).

[15]See PA. STAT. (1930) tit. 48, § 163.

[16]See *id.*, tit. 18, § 731.

[17]See *id.*, tit. 48, §§ 165, 166.

[18]Weiss v. Weiss, 6 D. & C. 669 (Pa. 1924). It is to be noted that Pennsylvania gives a "divorce" in cases of consanguinity. See PA. STAT. (1930) tit. 48, § 163, cited note 15, *supra*.

[19]Schofield v. Schofield, 51 Pa. Super. Ct. 564 (1912). By comparison of the terms of the statutes referred to in the text, *supra*, at notes 15–17, the court held that this was of the type of marriage to which the state would not lend the aid of its laws by permitting an intra-state ceremony but that it was not of the type which affected the morals and good order of the state.

[20]Weinberg v. Weinberg, 242 Ill. App. 414 (1926); Meisenhelder v. Chic. & N. Y. Ry., 170 Minn. 317, 213 N. W. 32 (1927); Johnson v. Johnson, 57 Wash. 89, 106 Pac. 500 (1910); Martin v. Martin, 54 W. Va. 302, 46 S. E. 120 (1903); see Sizeler v. Sizeler, 170 La. 128, 127 So. 388, 391 (1930).

The same result is reached in England. Brook v. Brook, 9 H. L. Cas. 193 (1861); Mette v. Mette, 1 Swa. & Tr. 416 (1859).

[21]Meisenhelder v. Chic. & N. Y. Ry., 170 Minn. 317, 213 N. W. 32 (1927) cited note 20, *supra*.

[22]9 H. L. Cas. 193 (1861).

[23]25 HEN. VIII, c. 7 and 28 HEN. VIII, c. 22. Lord Cranworth, speaking in Brook v. Brook, 9 H. L. Cas. 193, 226 (1861), cited note 22, *supra*, of the

quire declaration of nullity or annulment *ab initio*, or from the date of decree according to local practice. Statutes which declare incestuous the intermarriage of persons within a certain degree answer this test, as do those of any state forbidding the intermarriage of such persons and setting criminal penalties for sexual intercourse between such persons.[24] With regard to statutes declaring such marriages void,[25] marriages of uncle and niece or aunt and nephew, where there is the most distant relationship mentioned in the statute,[26] are declared so abominable that they should be treated in the same manner as those expressly declared in-

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effect of these statutes on the marriage of a man and his deceased wife's sister, said: "We do not hold the marriage to be void because it is contrary to the law of God, but because our law has prohibited it on the ground of its being contrary to God's law."

[24]The statutes of 26 States and of the Territory of Alaska are of one or the other of these types.

ALA. CODE (1923) § 8991; ALASKA COMP. LAWS (1933) §§ 1182, 4929; ARIZ. CIV. CODE (1928) § 2166; ARK. DIG. STAT. (Crawford & Moses, 1921) § 7038; CAL. CIV. CODE (1933) § 59; COLO. COMP. LAWS (1921) § 5548; FLA. COMP. GEN. LAWS (1927) 5th Div., pt. I, tit. II, c. viii, art. 3, §§ 7557, 7558; GA. CODE (1933) §§ 53-101, 53-102, 53-105; IDAHO CODE (1932) § 31-205; ILL. REV. STAT. (1935) c. 89, § 1; KAN. REV. STAT. (1923) § 22-102; KY. STAT. (Carroll, 1930) § 2096; LA. CIV. CODE (Dart, 1932) arts. 94, 95, Act 78 of 1884; MISS. CODE (1930) §§ 2359, 2360; MONT. REV. CODE (1921) § 5699; N. H. PUB. LAWS (1926) c. 286, §§ 1, 2, 3, c. 287, § 1; N. M. STAT. (1929 comp.) § 87-106; N. Y. CONS. LAWS (Cahill, 1930) c. 14, art. 2, § 5; N. D. COMP. LAWS (1913) § 4359; OKLA. STAT. (1931) § 1667; PA. STAT. (Purdon, 1930) tit. 18, § 731, tit. 48, § 163; S. C. CODE (1932) §§ 1440, 8566; S. D. COMP. LAWS (1929) §§ 106, 107; TEX. PEN. CODE (Vernon, 1925) arts. 495–498; UTAH. REV. STAT. (1933) § 40-1-1; VT. PUB. LAWS (1933) §§ 3062, 3063, 8607; WASH. REV. STAT. (Remington, 1932) §§ 2455, 8438.

Note: These statutes of Idaho and Pennsylvania apply to no relationship more distant than uncle-niece and aunt-nephew. For statutes covering more distant relationships, see notes 33 (Idaho) and 25 (Pa.), *infra*. The Louisiana Statute (Act 78 of 1884) defining incest in terms of the prohibitions of the Civil Code articles having been enacted before the addition of first cousins to the articles is held to apply to no relationship more distant than uncle-niece and aunt-nephew. State v. Couvillion, 117 La. 935, 42 So. 431 (1906).

[25]The following 10 States and the District of Columbia have statutes of this type: CONN. GEN. STAT. (1930) § 5148; DEL. REV. STAT. (1915) § 2992; D. C. CODE (1929) tit. 14, c. 1, § 1; IND. STAT. (Baldwin, 1934) § 5620; IOWA CODE (1935) § 10445; MD. CODE (1924) art. 62, §§ 1, 2; MASS. GEN. LAWS (Ter. ed. 1932) c. 207, §§ 1, 2, 3; MO. STAT. (Perm. ed. 1932) § 2974; NEV. COMP. LAWS (1929) §§ 4051, 4066; PA. STAT. (Purdon, 1930) tit. 48, §§ 165, 166 (covers first cousins. With respect to uncle-niece and aunt-nephew see note 24, *supra*); R. I. GEN. LAWS (1923) c. 287, §§ 1, 2, 3.

[26]Since only 12 States declare marriages between first cousins incestuous and 10 void, it does not seem that this relationship, nor *a fortiori*, any more distant relationship, can be held to be generally enough abhorred to call for the same treatment. Nor does it seem correct to split statutes which declare the marriages of first cousins void, in such manner as to construe them differently as to such marriages and those of closer relations. As noted *supra*, notes 15 and 17, the statutes of Pennsylvania treat differently the marriages of first cousins and of uncle-niece or aunt-nephew and are construed to have different effects.

cestuous.[27] Statutes which declare consanguineous marriages void, but not subject to attack after the birth of issue and after the death of either party,[28] or not subject to attack after the death of either party,[29] or void from the date of decree,[30] since they do not show abhorrence of the status as such, but do show sufficient dislike of the marriage to permit the parties to cause the dissolution thereof, have the effect of making the marriage voidable, even if contracted without the state, but not void *ab initio*.[31] Statutes which declare such marriages void if solemnized within the state,[32] or which prohibit or declare unlawful[33] such marriages, deny the aid of the law of the state to validate a ceremony but do not show real abhorrence of the status, and extra-state ceremonies are effective to create it.

(*b*) *Remarriage of Divorced Persons.* We turn next to statutes forbidding the remarriage of a divorced person during the life of the other spouse, or for a stated period from the date of the decree.[34] The prohibition may be directed against the remarriage of one party only, or it may apply to both parties. It may take the form of a simple prohibition. Such remarriages may be de-

[27]Forty-two States, Alaska, and the District of Columbia declare such marriages either incestuous or void.

[28]N. C. CODE (1935) § 2495.

[29]N. J. COMP. STAT. (1910) tit. Marriage, § 1, tit. Divorce, § 1 (II) (VII).

[30]VA. CODE (1930) §§ 4540, 5084, 5085, 5088.

[31]Since the word "void" is construed in various connections to mean "void without legal proceedings," "void *ab initio* if attacked," or "void from the date of a decree,"—either between the parties or as to all persons—it cannot be held that any magic power inheres in the word. As used in marriage statutes it is an indication of deprecation, but the degree of disapproval must be found elsewhere than in the naked word.

[32]ME. REV. STAT. (1930) c. 72, § 1, c. 73, § 1; ORE. CODE (1933) §§ 6-902, 33-102(2); WYO. REV. STAT. (1931) § 35-101 (Third).

[33]IDAHO CODE (1932) § 31-206 (covers first cousins. As to uncle-niece and aunt-nephew, see note 24, *supra*); MICH. COMP. LAWS (1929) §§ 12692, 12693; MINN. STAT. (Mason, 1927) § 8564; OHIO CODE (1934) § 1181; W. VA. CODE (1932) §§ 4680, 4681.

[34]In this discussion the word "divorce" is to be understood to intend a complete dissolution of the marriage, a decree *a vinculo matrimonii*. A decree of divorce *a mensa et thoro* does not restore the parties to the condition of unmarried persons, but leaves the status *qua* status intact. Givens v. Givens, 121 Fla. 270, 163 So. 574 (1935). An interlocutory decree or a decree *nisi* does not dissolve the marriage until made absolute, either by the passage of time or on the motion of a party or by the court of its own motion. Mossholder v. Industrial Commission, 329 Ill. 497, 160 N. E. 835 (1928); Wright v. Wright, 264 Mass. 453, 162 N. E. 894 (1928); Sanders v. Industrial Commission, 64 Utah 372, 230 Pac. 1026 (1924). This method of control is now in effect under the following statutes: CAL. CIV. CODE (1933) § 132; COLO. COMP. LAWS (1921) § 5604; DEL. REV. STAT. (1915) § 3026; MASS. GEN. LAWS (Ter. ed. 1932) c. 208, § 21; NEB. COMP. STAT. (1929) § 43-240; N. J. COMP. STAT. (1910) tit. Divorce, §§ 20, 21; R. I. GEN. LAWS (1923) c. 292, § 19;

clared void or subject to the penalties of bigamy; or there may be an attempt to impose a personal incapacity which will follow the person into another state. Except in the cases of simple prohibition, the question appears to be whether the marriage was in fact completely dissolved by the decree or if the state which had jurisdiction of the status to grant a divorce has, in effect, given a decree which is to be treated like a decree *nisi* or like a temporary decree for a limited divorce which will of its own weight ripen by the lapse of time into an absolute divorce.

Considering first statutes simply forbidding or declaring unlawful the remarriage of one party to a divorce, we take note that the nearly unanimous course of decisions holds such prohibitions to have no extra-territorial effect.[35] These cases are put on the basis that a prohibition to one party only, whether applying to the guilty party or to the guilty party in divorces on specified grounds, usually adultery, is of the nature of a penalty and can, therefore, have no extra-territorial force; or on the ground that a marriage valid where contracted is everywhere valid and that this particular type of marriage does not come within the recognized exceptions; or there is mention of or insistence on the fact that no "evasion statute" exists.

Decisions founded on the theory of a penalty seem to represent a lack of appreciation of the problem involved and a wooden reliance on a general statement of the principles of jurisdiction.[36]

UTAH REV. STAT. (1933) §§ 40-3-6, 40-3-7, 40-3-8; VT. PUB. LAWS (1933) § 3127; WASH. REV. STAT. (Remington, 1932) § 988. A similar result is reached by the statute of Georgia, GA. CODE (1933) §§ 30-101, 30-119, which requires for absolute divorce the concurrent verdicts of two juries at different terms of court.

[35]Fuller v. Fuller, 40 Ala. 301 (1866); Smith v. Goldsmith, 223 Ala. 155, 134 So. 651 (1931); Criss v. Industrial Commission, 348 Ill. 75, 180 N. E. 572 (1932); Succession of Hernandez, 46 La. Ann. 962 (1894); Phillips v. Madrid, 83 Me. 205, 22 Atl. 114 (1891); Dimpfel v. Wilson, 107 Md. 329, 68 Atl. 561 (1908); Putnam v. Putnam, 8 Pick. 433 (Mass. 1829); Commonwealth v. Lane, 113 Mass. 458 (1873); Gardner v. Gardner, 232 Mass. 253, 122 N. E. 308 (1919); *Ex parte* Crane, 170 Mich. 651, 136 N. W. 587 (1912); Crawford v. State, 73 Miss. 172, 18 So. 848 (1895); Ponsford v. Johnson, 2 Blatchf. 51 (C. C. S. D. N. Y. 1847); Van Voorhis v. Brintnall, 86 N. Y. 18 (1881); Fisher v. Fisher, 250 N. Y. 313, 165 N. E. 460 (1929); Van Storch v. Griffin, 71 Pa. 240 (1872); Dickson v. Dickson's Heirs, 1 Yerg. 110 (Tenn. 1826); State v. Shattuck, 69 Vt. 403, 38 Atl. 81 (1897); Patterson v. Modern Woodmen of America, 89 Vt. 305, 95 Atl. 692 (1915); Frame v. Thormann, 102 Wis. 653, 79 N. W. 39 (1891); Fordham v. Marrero, 273 Fed. 61 (C. C. A. 1st, 1921); Loughran v. Loughran, 292 U. S. 216, 78 L. ed. 1219 (1934); Scott v. Att'y Gen., 11 P. D. 128 (1886); Lundgren v. O'Brien, [1921] VICT. L. R. 361.

[36]See Huntington v. Attrill, 146 U. S. 657, 673, 36 L. ed. 1123, 1130 (1892), per Mr. Justice Gray: "Any personal disabilities imposed by the law of the state, as an incident or consequence of a judicial sentence or decree, by way of punishment of an offender, and not for the benefit of any other person—such as attainder, or infamy, or incompetency of a convict to testify, or disqualification of the guilty party to a cause of divorce to marry again—are

It is possible, however, to justify such decisions on the ground that, if the prohibition was intended as a penalty, the legislator knew this general principle and declared that the policy of the state was to refuse to lend its aid to ceremonies validating such marriages, but not to refuse to create the status provided its own law was not used to violate its own command.[37]

Decisions based on statements that the law of the place of ceremony controls the validity of marriages also represent wooden reliance on a doctrine, unless the court means to declare that it was not the intention of the legislator to abrogate the application of the doctrine.[38] There may be an indication that the intention shown by the various statutes was to recognize the general doctrines of jurisdiction, or to approve by implication the doctrine *locus regit actum* in the failure to enact an evasion statute in one of the various forms, for by the enactment of such a statute the intention to change the common law rules can be clearly shown.[39] This intention has been uniformly recognized in the cases, concerning prohibitions to the guilty party, which have come before the courts after the enactment of the Uniform Marriage Evasion Act.[40]

One recognized exception to the general rule appears in cases involving marriages between the guilty party of a divorce for adultery and his or her paramour. Where statutes expressly forbid such unions, extra-state marriages of that type are uniformly declared void for all purposes.[41] While the decisions are put generally on grounds of offense to the policy and good morals of the state,[42] it is probable that the actual purpose is to add another

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doubtless strictly penal, and therefore have no extra-territorial operation."

See also Phillips v. Madrid, 83 Me. 205, 22 Atl. 114, 115 (1891); W. Cambridge v. Lexington, 1 Pick. 506, 508 (Mass. 1823); Crawford v. State, 73 Miss. 172, 178, 18 So. 848, 849 (1895); Van Voorhis v. Brintnall, 86 N. Y. 18, 32 (1881).

[37]See Putnam v. Putnam, 8 Pick. 433, 435 (Mass. 1829).

[38]See Commonwealth v. Lane, 113 Mass. 458, 464 (1873).

[39]This is said to be the purpose of marriage evasion acts. See Van Voorhis v. Brintnall, 86 N. Y. 18, 35 (1881); State v. Shattuck, 69 Vt. 403, 407, 38 Atl. 81, 82 (1897); State v. Hand, 87 Neb. 189, 126 N. W. 1002 (1910).

[40]Murphy v. Murphy, 249 Mass. 552, 144 N. E. 394 (1924); Witherington v. Eldredge, 264 Mass. 166, 162 N. E. 300 (1928); Wright v. Wright, 264 Mass. 453, 162 N. E. 894 (1928); Wheelock v. Wheelock, 103 Vt. 417, 154 Atl. 665 (1931).

[41]Succession of Gabisso, 119 La. 704, 44 So. 438 (1907); *In re* Stull's Estate, 183 Pa. 625, 39 Atl. 16 (1898); Immendorf's Estate, 21 Pa. Cty. Ct. 268 (1898); Kline v. Kline, 41 Lanc. 563, 43 York 114 (Pa. 1929); Pennegar v. State, 87 Tenn. 244, 10 S. W. 305 (1889).

It is possible that Williams v. Oates, 5 Ired. L. 535 (N. C. 1845), can be justified on the same theory. It is impossible to justify the decision on the theory shown by the opinion—that the marriage, as to the guilty party, was still subsisting. How can one think of the guilty party as married, but married to no one?

[42]*In re* Stull's Estate, 183 Pa. 625, 39 Atl. 16, 17 (1898); Pennegar v. State, 87 Tenn. 244, 10 S. W. 305, 306 (1889), both *supra* note 41.

influence to discourage adultery leading to divorce rather than to prevent marriages which, after the divorce, are offensive to the moral sense of the people of the state.

When we turn from this type of prohibition to statutes forbidding the remarriage of *either* party for a specified period from the date of the decree of divorce we see the same attitude. If the statute forbids or declares unlawful or void such remarriage, the decisions as to ceremonies in states other than the state passing the decree of divorce are similar to those made in cases concerning the other types of prohibited unions. If the sentiment of the state is thought to be sufficiently hostile, the extra-state remarriage is void—otherwise it is valid. Where the statute simply forbids or declares unlawful any remarriage of either party to a divorce if contracted within a certain period, it is held that no intent to affect extra-territorial ceremonies is shown.[43] These decisions are based upon the ground that these marriages are not expressly declared void; that no incapacity is imposed by the statute; that there is no suspension of the absolute operation of the decree, either express or by necessary implication; and that there is no declaration of a policy strong enough to supersede the *jus gentium*.[44]

Where the applicable statute declares all such marriages void, the decisions vary in accordance with the opinions of the courts as to the strength of policy indicated by the word "void." In the leading case in California, In re *Wood's Estate*,[45] it was noted that

[43]Wilson v. Holt, 83 Ala. 528, 3 So. 321 (1887); Horton v. Horton, 22 Ariz. 490, 198 Pac. 1105 (1921); Loth v. Loth's Estate, 54 Colo. 200, 129 Pac. 827 (1913); Griswold v. Griswold, 23 Colo. App. 365, 129 Pac. 560 (1913); Crouse v. Wheeler, 62 Colo. 51, 158 Pac. 1100 (1916); Criss v. Industrial Commission, 348 Ill. 75, 180 N. E. 572 (1932); Dudley v. Dudley, 151 Iowa 142, 130 N. W. 185 (1911); Farrell v. Farrell, 190 Iowa 919, 181 N. W. 12 (1921); Houston v. Houston, 200 Iowa 162, 204 N. W. 239 (1925); Conn v. Conn, 2 Kan. App. 419 (1894); State v. Hand, 87 Neb. 189, 126 N. W. 1002 (1910); Goodwin v. Goodwin, 158 App. Div. 171, 142 N. Y. Supp. 1102 (1913); Turpin v. Turpin, 58 S. W. 763 (Tenn. Ch. App. 1899); Wingo v. Rudder, 120 S. W. 1073 (Tex. Civ. App. 1909); Willey v. Willey, 22 Wash. 115, 60 Pac. 145 (1900); Hoagland v. Hoagland, 27 Wyo. 178, 193 Pac. 843 (1920).

[44]Griswold v. Griswold, 23 Colo. App. 365, 129 Pac. 560 (1913); Horton v. Horton, 22 Ariz. 490, 198 Pac. 1105 (1921); Hoagland v. Hoagland, 27 Wyo. 178, 193 Pac. 843 (1920), all *supra* note 43.

The inconveniences that might arise from the fact that the Colorado statute provided that divorce decrees might be reopened within the period of the prohibition, were noted by the court of New York in Goodwin v. Goodwin, 158 App. Div. 171, 142 N. Y. Supp. 1102 (1913), but the decision was felt necessary as the divorce was absolute.

[45]137 Cal. 129, 69 Pac. 900 (1902). Accord: Mohn v. Tingley, 191 Cal. 470, 217 Pac. 733 (1923); Webster v. Modern Woodmen of America, 192 Iowa 1336, 186 N. W. 659 (1922); *In re* Ommang's Estate, 183 Minn. 92, 235 N. W. 529 (1931); Wheelock v. Freiwald, 66 F. (2d) 694 (C. C. A. 8th, 1933).

See *a fortiori* Woodward v. Blake, 38 N. D. 38, 164 N. W. 156 (1917). Here was involved a statute (N. D. Sess. L. 1901, c. 70) providing that: The effect of a judgment of divorce is to return the parties to the state of un-

the period in which an appeal could be brought was not coterminous with the period of prohibition; and, since there was no provision in the statutes for a decree *nisi*,[46] it was held that the prohibition was penal and not extra-territorial.[47] The decisions in Illinois[48] and Wisconsin[49] are uniformly to the effect that such extra-state marriages are void if there was an intent to return to the state after the ceremony. In the former state, the basis of decision is that the statute was intended to control the marriages of citizens of the state, wherever the ceremony might be performed; and that "to hold that parties could, by going to an adjoining state temporarily, render the prohibition of the statute nugatory, in these days of cheap and rapid transportation, when the parties may go from any part of the state to an adjoining state and return in a few hours, is to render the act useless and the law-making power

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married persons, except that neither party to a divorce may remarry within three months after the time such a divorce is granted. On the ground that the remarriage was not declared void and that the time for appeal was not coterminous (one year) an intra-state remarriage was held valid.

Compare Wood v. Wood's Estate, 137 Cal. 148, 69 Pac. 981 (1902), where the wife of the marriage held valid in *In re* Wood's Estate, *supra*, was denied a cause of action on a premarital contract in consideration of the marriage—with Mohn v. Tingley, *supra*, where the wife was held entitled to maintain an action for alienation of affections.

[46]It is interesting to note that provision was made for an interlocutory decree by an Act of 1903. Cal. Stat. 1903, p. 76.

[47]The courts of California, following *In re* Wood's Estate, 137 Cal. 129, 69 Pac. 900 (1902), note 45, *supra*, have consistently held that statutes forbidding the remarriage of both parties to a divorce do not have extra-territorial effect. People v. Woodley, 17 Cal. App. 263, 136 Pac. 312 (1913) (considering the statute of Washington, which forbade a remarriage for a period coterminous with the period for bringing appeal and which applied in terms to remarriage within or without the state). It is possible, even probable, that the decision in this case was influenced by the subject matter. It was a conviction of the defendant, under a statute, for placing and permitting his wife to be kept in a house of prostitution, and the marriage had to be held valid or the woman would not have been his "wife." There was no element of pride in the power of California, for the remarriage was celebrated in Oregon. Again, People v. Goddard, 84 Cal. App. 382, 258 Pac. 447 (1927), a conviction for bigamy, reached a like result with regard to the Oregon statute. See Oregon cases, note 55, *infra*.

[48]Wilson v. Cook, 256 Ill. 460, 100 N. E. 222 (1912); Stevens v. Stevens, 304 Ill. 297, 136 N. E. 785 (1922); Kruger v. Kruger, 36 Nat. Corp. Rep. 443 (Ill. Super. Ct. 1908); Lincoln v. Riley, 217 Ill. App. 571 (1920); Nehring v. Nehring, 164 Ill. App. 527 (1923).

The force of the Illinois policy prior to 1923 is shown by Stevens v. Stevens and Kruger v. Kruger, *supra*. In the former case, the extra-state marriage was in attempt to avoid the statute of Illinois which was held to apply to a divorce in Arkansas. In the latter, the plaintiff divorced the defendant in Illinois, the decree providing for alimony until her remarriage. Within the prohibited period she went through an extra-state ceremony. It was held that this ceremony was so totally ineffective to create a marriage that she was entitled to maintain an action for alimony.

The same result with regard to the Illinois policy is shown when the matter comes before the courts of a third State. In Hall v. Industrial Commission, 165 Wis. 364, 162 N. W. 312 (1917), a case arising under the statute of Illinois (Laws 1905, p. 194, §§ 1, 1a) and the Uniform Marriage Evasion Act, the

impotent."[50] In the latter state, in *Lanham v. Lanham*,[51] after using language similar to that just quoted, the court said further that to construe the statute as solely territorial would be to "ascribe practical imbecility to the law-making power" and that "a construction which produces such an effect should not be given it, unless the terms of the act make it necessary." The opinion continued further to point out that there was no limitation, in express terms, on the place of the ceremony; and that no language was used from which any territorial limitation would naturally be implied.

Other types of statutes raise a different problem; namely, was the divorce in fact absolute, or was there, rather, a provision for a decree which should be treated as a decree *nisi* or interlocutory, or for a limited divorce during the specified period. Such construction may arise from the fact (1) that the period for appeal from the decree is coterminous with the period of prohibition, or (2) from a declaration that the parties "shall be returned to the state of unmarried persons except that neither shall be capable of contracting marriage with a third person" within the period, or (3) that the marriage "shall not be deemed to be dissolved" within the period. Under the first type of statute, in Washington, the court, construing the statute of its own state,[52] treated the prohibition as a declaration of policy which affected only marriage between per-

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court declared that a remarriage celebrated in Indiana within the prohibited period was void. See also People v. Steere, 184 Mich. 556, 151 N. W. 617 (1915).

Where the parties do not intend to return to Illinois, remarriages within the period are uniformly held valid, whether the case comes before the courts of Illinois, Nelson v. Nelson, 200 Ill. App. 584 (1916); Lehman v. Lehman, 225 Ill. App. 513 (1922); or before the courts of other States, Webster v. Modern Woodmen of America, 192 Iowa 1336, 186 N. W. 659 (1922); Owen v. Owen, 178 Wis. 609, 190 N. W. 363 (1922); Fitzgerald v. Fitzgerald, 210 Wis. 543, 246 N. W. 680 (1933). Accord: Powell v. Powell, 207 Ill. App. 292 (1917), *aff'd* 282 Ill. 357, 118 N. E. 786 (1918) (Ind. prohibition).

[49]Lanham v. Lanham, 136 Wis. 360, 117 N. W. 787 (1908); Severa v. Baranak, 138 Wis. 144, 119 N. W. 814 (1909). See Lyannes v. Lyannes, 171 Wis. 381, 390, 177 N. W. 683, 686 (1920), where Eschweiler, J., characterized as void all marriages when either of the parties has a spouse living from whom he or she is not legally divorced, saying: "[This] class includes those as between whom a judgment of divorce has already been entered, but by the public policy of the jurisdiction in which the divorce is granted are prohibited from another marriage within a statutory period after such judgment, and as to whom, in effect, the matrimonial knot is not yet completely severed by the sword of divorce."

[50]Nehring v. Nehring, 164 Ill. App. 527, 532 (1923).

[51]136 Wis. 360, 367, 117 N. W. 787, 789 (1908).

[52]WASH. LAWS 1893, c. 94, p. 225, § 1, prohibiting the remarriage of either party to a suit for divorce for six months from the date of the decree, the period for appeal, and declaring that: "All marriages contracted in violation of this section whether contracted within or without the state shall be void."

sons who intend to live in the state.[53] In British Columbia, on the other hand, a decree under this statute was treated as having only the effect of a decree *nisi*.[54] Under the second type of statute, extra-state remarriages are declared void in the courts of Oregon upon the ground that otherwise a person might have two lawful wives or husbands at the same time if the divorce decree should be reversed on appeal,[55] and that during the period in which an appeal might be brought the incapacity arising from the status of mar-

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[53]Intention to return to and live within the state, marriages void: Knoll v. Knoll, 104 Wash. 110, 176 Pac. 22 (1918); Peerless Co. v. Burkhard, 90 Wash. 221, 155 Pac. 1037 (1916); *In re* Kienstra, 151 Wash. 424, 276 Pac. 294 (1929), *decree modified on another point*, 282 Pac. 221 (1929). The same result was reached with regard to this statute in a third state. Huard v. McTeigh, 113 Ore. 279, 232 Pac. 658 (1925).

Intention to live in another state, marriages valid: State v. Fenn, 47 Wash. 561, 92 Pac. 417 (1907); Pierce v. Pierce, 58 Wash. 622, 109 Pac. 45 (1910).

In an early case, now overruled, a decree under this statute was held to have had the effect of an interlocutory decree. *In re* Smith's Estate, 4 Wash. 702, 30 Pac. 1059 (1892). Accord: Vance v. State, 210 Ala. 9, 97 So. 230 (1923).

[54]*In re* Marriage Act and Eaton, 30 B. C. Rep. 243 (1911). The court expressly refused to follow Pierce v. Pierce, 58 Wash. 622, 109 Pac. 45 (1910), note 53 *supra*, but considered itself bound by the decision in Warter v. Warter, 15 P. D. 152 (1890) (construing the Indian Divorce Act which allowed the remarriage of either party to a divorce after six months, provided no appeal had been filed within that time). The decision in the English and Canadian cases is to the effect that the marriage was not entirely dissolved by the decree until the end of the specified period. See State v. Yoder, 113 Minn. 503, 509, 130 N. W. 10, 12 (1911).

[55]McLennan v. McLennan, 31 Ore. 480, 50 Pac. 802 (1897); Hooper v. Hooper, 67 Ore. 191, 135 Pac. 525 (1913). See ORE. CODE (1930) § 6-916.

It appears that the purpose of this statute is to give the decree an interlocutory effect only where an appeal is possible. Thus it was held, in State v. Laesia, 45 Ore. 710, 78 Pac. 328 (1904), that the marriage was absolutely dissolved where the libellee had no right of appeal due to his failure to answer or appear in the divorce action, and that his ex-wife was competent as a witness against him on a trial for murder. The court expressly refused to express an opinion as to the effect of a regular appeal.

It should be noted that the decision can also be explained on the theory that the family was already broken up by the divorce and the policy giving rise to the incompetency of a wife could no longer be invoked.

Again, in Wallace v. McDaniel, 57 Ore. 378, 117 Pac. 314 (1911), it was held that where there remained only two and one-half hours in which appeal could be filed and where the libelee, who alone could appeal, was such a distance from the court which passed the decree that she would in fact have been unable to file the appeal within those hours, she could waive the right of appeal and her remarriage was effective to legitimize children born of that remarriage.

Compare Twigger v. Twigger, 110 Ore. 520, 223 Pac. 1934 (1922), wherein, with regard to a remarriage in Washington, it was said that such remarriage was void in Oregon, but that: "None of our decisions go so far as to say that it would be otherwise than valid in Washington;" and People v. Goddard, 84 Cal. App. 382, 258 Pac. 447 (1927), relying on the Twigger case. (Note: It is not shown in this latter case whether an appeal was available or not, the court treating the Oregon statute as a simple prohibition.)

riage had not been removed.[56] Under the third type, it is held in Virginia[57] and West Virginia[58] that the status, as to both parties to the divorce, subsists until the end of the specified period, as the decree has only the effect of a decree *nisi*.

Statutes merely prohibiting the remarriage, within a specified period, of either party to a divorce suit are properly construed to show merely a refusal to lend the aid of the law of the state to the creation of the marriage status where the divorce was granted in the state and the second ceremony there performed.[59]

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[56]McLennan v. McLennan, 31 Ore. 480, 50 Pac. 802, 803 (1897), cited note 55, *supra*.

Another type of statute which should be construed as one which declares that the decree shall have only a limited effect provides that—The divorce shall operate as a dissolution of the marriage, but that it shall be unlawful for either party to marry again within six months from the date of the decree and any such marriage shall be null and void and the offender deemed guilty of bigamy. See KAN. REV. STAT. (1923) § 60-1512; OKLA. STAT. (1931) § 674.

This type was held in Kansas to keep the status in existence during the six months period. Blush v. State, 4 Kan. App. 145, 150 (1896). But the case was overruled, *sub silentio*, by Durland v. Durland, 67 Kan. 734, 74 Pac. 274 (1903), where it was held that the marriage was absolutely dissolved by the decree. This decision was followed in Bauer v. Abrams, 73 Colo. 509, 216 Pac. 259 (1923), and Wheelock v. Freiwald, 66 F. (2d) 694 (C. C. A. 8th, 1933), both expressly following the construction of the Durland case and treating the prohibition as an expression of policy.

The suggested construction has been adopted in Oklahoma. Atkeson v. Sovereign Camp, W. O. W., 90 Okla. 154, 216 Pac. 467 (1923); Harvey v. State, 31 Okla. Cr. App. 299, 238 Pac. 862 (1925); Yeats v. State, 30 Okla. Cr. App. 320, 236 Pac. 62 (1925). In the first of these cases an extra-state marriage was held void on the theory of Lanham v. Lanham, 136 Wis. 360, 117 N. W. 787 (1908). The court said that the statute was clearly intended to discourage progressive polygamy, and to remove one of the inducing causes of bringing divorce actions. In the second case the remarriage was held valid and the defendant guilty of bigamy with a third woman where it was not shown that there had been any intent to evade the laws of Oklahoma. In the third case, the defendant was held guilty of abduction for the purpose of marriage where the intention of the parties was to live in Texas after the ceremony.

[57]Heflinger v. Heflinger, 136 Va. 289, 118 S. E. 316 (1923). *Cf.* Simpson v. Simpson, 162 Va. 621, 175 S. E. 320 (1933), where, however, the actual decision was that the evil which it was intended to remedy did not exist where the libelee had been absent for seven years before the bringing of the divorce action. Campbell, C. J., dissented on the ground that the libellant in the divorce case chose not to stand on the presumption of death arising from the absence, and that, having chosen to sue for divorce, she took the decree *cum onere*.

[58]Johnson v. State Compensation Comm'r, 116 W. Va. 232, 179 S. E. 814 (1935). This was the case of a person divorced in Virginia who went through a ceremony in West Virginia with a domiciliary of that State. The marriage was held void on the basis of the interlocutory effect of the Virginia divorce decree. It is particularly to be noted that it is probable that the domicil of the person under disability was, at the time of the remarriage, also in West Virginia.

[59]Five States have enacted such statutes. IOWA CODE (1933) § 10484; MICH. COMP. LAWS (1929) § 12765; MINN. STAT. (Mason, 1927) § 8564; N. D. COMP. LAWS (1913) § 4379; TEX. REV. CIV. STAT. (Vernon, 1925) art. 4640

The proper construction of statutes declaring such marriages void is that they are declarations of policy which may or may not be sufficiently strong to require the court to hold that the state refuses to create the status of marriage for persons who must look to it for that creation.[60] The writer submits that the use of the word "void" is a sufficiently strong indication of intention to withdraw this type of marriage from the general rule of the common law, and to declare that all such marriages, wherever celebrated, to which the law of the state is applicable are absolutely void. This conclusion is fortified by the great importance placed upon the use of that word in regard to the various other types of prohibited marriages.[61] As stated by the courts of Illinois and Wisconsin, the purpose of such a statute is to discourage the practice of progressive polygamy; and to hold that it was intended to have a purely territorial effect would be to ascribe virtual imbecility to the law-making power.[62] We can well agree with the court of Virginia when it says: "We are satisfied that the annulment of such marriages is a more effectual way of preventing such violations of the statutes and public policy of the state than an affirmance of them would."[63]

The policy shown by such prohibitions comprises merely a refusal to have the law of a State used for the purpose of a divorce preliminary to one step or one more step in progressive polygamy, and, therefore, only when the State in which the divorce was decreed is also the intended matrimonial domicil are such statutes applicable.[64]

(prohibition applies to divorces on the ground of cruel treatment only).

This result arises *a fortiori* in that State which also enacted a declaration that the effect of a judgment of divorce is to restore the parties to the state of unmarried persons; N. D., *supra*. It will be noted that a number of the States and the Territory of Alaska have statutes which declare that the effect of a judgment of divorce completely dissolves the marriage, or restores the parties to the state of unmarried persons, or that either may remarry. ALASKA COMP. LAWS (1933) § 3997; KY. STAT. (Carroll, 1930) § 2118; GA. CODE (1933) § 30-119; LA. CIV. CODE (Dart, 1932) art. 159; MONT. REV. CODE (1921) § 5735; NEV. COMP. LAWS (1929) § 9466; N. C. CODE (1935) § 1663; S. D. COMP. LAWS (1929) § 136; TENN. CODE (1934) § 8452.

[60]Such statutes now exist in two States. IDAHO CODE (1932) § 31-207; WIS. STAT. (1933) § 245-03(2).

The enactment, in Idaho, of § 31-602 declaring that effect of a decree of divorce is to restore the parties to the state of unmarried persons is an indication that the policy of the State is not strong.

[61]See Brook v. Brook, 9 H. L. Cas. 192, 230, 237, 240 (1861); Pennegar v. State, 87 Tenn. 244, 10 S. W. 305, 306 (1889).

[62]See Nehring v. Nehring, 164 Ill. App. 527, 532 (1923), and Lanham v. Lanham, 136 Wis. 360, 367, 117 N. W. 787, 789 (1908).

[63]See Heflinger v. Heflinger, 136 Va. 289, 297, 118 S. E. 316, 318 (1923).

[64]The general attitude may show that there is no general policy against progressive polygamy, but that there is a realization that the sudden remarriage which is primarily shocking to the moral sense of a community is that which includes the return to live in that community of a new family comprising

With regard to statutes prohibiting or declaring void any remarriages within a period coterminous with that in which an appeal may be filed and thereafter until the case is decided on appeal, the doctrine of the courts of England and of British Columbia properly assimilates such statutes to the type which provides for decrees *nisi*.[65] Where the prohibition is for a period greater, or less, than the period for appeal the determination is again referred to the terminology; if the terms are simply prohibitory the extra-state marriage should be held valid; and if there is a declaration that such marriages are void the problem raised is identical with that raised by statutes merely declaring marriages within the prohibited period void.[66]

Statutes which provide that the decree shall act as a dissolution of the marriage as to both parties, except that neither shall be capable of contracting marriage with a third person for a specified period, or that the marriage shall not be deemed to be dissolved as to any remarriage of either party during such period,[67] should be taken as declarations that the divorcing state has temporarily withheld one effect of divorce—the restoration of the capacity to marry—and is in effect a provision for a decree of divorce *a mensa et thoro* which will become, by the running of the specified period, an absolute divorce. The results of such construction harmonize with the effect of decrees for limited divorce, under statutes in somewhat similar terms, upon the relations and status of the parties.[68]

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a person or persons who have theretofore lived there. It is only in Illinois that a statute prohibiting the remarriage of a divorced person within specified period is applied to a divorce decree in another State. Stevens v. Stevens, 304 Ill. 297, 136 N. E. 785 (1922). See also note 48, *supra*.

[65]Warter v. Warter, 15 P. D. 152 (1890), and *In re* Marriage Act and Eaton, 30 B. C. Rep. 243 (1911). See discussion of *In re* Wood's Estate, text at note 45, *supra*, and of Woodward v. Blake in note 45. See ALA. CODE (1923) § 7425; ARIZ. CIV. CODE (1928) § 2184.

[66]See KAN. REV. STAT. (1923) § 60-1514; OKLA. STAT. (1931) § 674. It is noteworthy that the Kansas statute which is the more explicit of these—marriage void and the party deemed guilty of bigamy—is construed by the courts to have no extra-territorial effect; while that of Oklahoma has such effect. Compare Durland v. Durland, Bauer v. Abrams and Wheelock v. Freiwald with Atkeson v. Sovereign Camp, W. O. W., all *supra* note 56.

[67]See ORE. CODE (1930) § 6-916; VA. CODE (1930) §§ 5113, 5114.

[68]Marshall v. Baynes, 88 Va. 1040, 14 S. E. 978 (1892) (holding the husband's right of courtesy excluded as to after acquired real estate by a divorce *a mensa et thoro*). The applicable statute was VA. CODE (1930) § 2264: "Such decree shall operate upon property thereafter acquired and upon the personal rights and legal capacities of the parties as a decree for divorce from the bonds of matrimony, except that neither party shall marry again during the life of the other."

Compare Givens v. Givens, 121 Fla. 270, 163 So. 574 (1935), holding that a divorce *a mensa et thoro* decreed in Virginia was a divorce within the meaning of FLA. COMP. GEN. LAWS (1927) § 49.83, par. 8, providing that a divorce in another State is grounds for divorce in Florida at the suit of the libelee in the extra-state divorce.

(*c*) *Miscegenation.* The problem of miscegenous extra-state marriages is important only in the southern and western States. The question is, not on the wording of a statute, but on the abhorrence of the people of the state for such marriages,[69] an abhorrence known to the judges as members of the people. A realization of the sectional nature of this revulsion appears in the case of *State v. Ross*, in North Carolina, where Rodman, J., said:[70] "However revolting to us and to all persons, who by reason of living in States where the two races are nearly equal in numbers have an experience of the consequences of matrimonial connexions between them, such a marriage may appear, such cannot be said to be the common sentiment of the civilized and Christian world." It appears also in the Tennessee case of *Pennegar v. State*,[71] where Folkes, J., distinguished *State v. Bell*[72] from *Medway v. Needham*[73] on the ground that the decision in the former represented a recognition of strong public policy and in the latter, a recognition of ideas of political expediency. Only in *Medway v. Needham* and in *State v. Hand*[74] has the question come before the court of any State other than one wherein the sentiment against miscegenous marriages is very strong, and in those cases the marriage was held valid; all others have held the marriage void.[75]

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[69]It is to be noted that statutes which, in other connections, would be held to apply only to intra-state ceremonies are, in connection with miscegenation, held to apply to extra-state ceremonies. See OKLA. STAT. (1931) § 1677 as applied in Eggers v. Olson, 104 Okla. 297, 231 Pac. 483 (1924).

[70]76 N. C. 242, 246 (1877).

[71]87 Tenn. 244, 251, 252, 10 S. W. 305, 307, 308 (1889).

[72]7 Baxt. 9 (Tenn. 1872).

[73]16 Mass. 157 (1819).

[74]87 Neb. 189, 126 N. W. 1002 (1910). It is noteworthy that the court did not mention the fact that a miscegenous marriage was in question—recourse to the briefs of counsel was necessary to discover it—and that the court relied strongly upon the absence of an evasion statute and the existence of § 316, ANN. STAT. (1907), providing that marriages valid where contracted should be valid in Nebraska.

[75]State v. Tutty, 41 Fed. 753 (C. C. S. D. Ga. 1890); Dupre v. Boulard, 10 La. Ann. 411 (1855); State v. Kennedy, 76 N. C. 251 (1877); Eggers v. Olson, 104 Okla. 297, 231 Pac. 483 (1924); State v. Bell, 7 Baxt. 9 (Tenn. 1872); Pennegar v. State, 87 Tenn. 244, 10 S. W. 305 (1889); Kinney v. Comm., 30 Gratt. 858 (Va. 1878); *Ex parte* Kinney, 3 Hughes 9, Fed. Cas. No. 7825 (C. C. Va. 1819); Greenhow v. James' Ex'r, 80 Va. 636 (1885); Wilbur's Estate v. Bingham, 8 Wash. 35, 35 Pac. 407 (1894).

Chetti v. Chetti, [1909] P. 67, holding valid the marriage in England of a woman domiciled in England with a Hindu is probably an example of the apparent exception found by Cheshire; namely, that the law of England controls if the ceremony is in England and one of the parties is English. He speaks of the exception as an example of "insular pride and complacency." CHESHIRE, PRIVATE INTERNATIONAL LAW (1935) 161, 162, 165.

It is possible that California is now to be classed with Massachusetts. See People v. Godines, 17 Cal. App. (2d) 721, 62 P. (2d) 787 (1936) (extra-state marriage of white woman and Filipino).

The various statutes prohibiting miscegenous marriages are, with the exception of that of Wyoming,[76] so worded as to show a public policy strong enough to require the courts to hold that such marriages are void wherever the place of ceremony. The prohibition is found in the Constitution of Alabama;[77] all of the States but three declare such marriages void; and one of the three above mentioned declares them felonious,[78] and another void from the date of a decree of nullity.[79] All of these statutes apply to marriages between white persons and negroes;[80] two add Indians;[81] seven add Mongolians;[82] three cover nearly any possible intermarriage of persons of the white race with persons of other races;[83] two cover practically every possible mixture of blood.[84]

(*d*) *Marriages of Persons Within Age.* It is apparent from the decisions of the courts on this subject and the legislative attitude expressed by the statutes that the fact of being within the statutory age of consent to marriage is rarely considered one of the essentials requiring declarations of nullity even where the ceremony is within the state.[85] In New York, where the question is

[76]WYO. REV. STAT. (1931) § 68-118; and see State v. Hand and comment thereon in note 74, *supra*.

[77]ALA. CONST. § 102. ALA. CODE (1928) § 5001 imposes a penalty upon the parties.

[78]OKLA. STAT. (1931) §§ 1677, 1678.

[79]W. VA. CODE (1932) § 4701.

[80]ALA. CONST. § 102; ARK. DIG. STAT. (Crawford & Moses, 1921) § 7039; COLO. COMP. LAWS (1921) § 5548; DEL. REV. STAT. (1915) § 2992; FLA. COMP. GEN. LAWS (1927) 4th Div., tit. II, c. 1, art. 1, § 5857; IND. STAT. (Baldwin, 1934) § 5619; KY. STAT. (Carroll, 1930) § 2097; LA. CIV. CODE (Dart, 1932) art. 94; MD. CODE (1924) art. 27, § 365; N. D. COMP. LAWS (1913) § 9582; OKLA. STAT. (1931) § 1677; TENN. CODE (1934) § 8409; TEX. REV. CIV. STAT. (Vernon, 1925) art. 4607, PEN. CODE (Vernon, 1925) art. 492; VA. CODE (1930) § 5087; W. VA. CODE (1932) § 4701. Note: To these statutes are to be added those cited in notes 81–84, *infra*.

[81]N. C. CODE (1935) § 2495; S. C. CODE (1932) § 8571.

[82]IDAHO CODE (1932) § 31-206; MISS. CODE (1930) § 2361; MO. STAT. (Perm. ed. 1932) § 2974; MONT. REV. CODE (1921) §§ 5700, 5701, 5702; NEB. COMP. STAT. (1929) § 42-103; ORE. CODE (1930) § 33-102; UTAH REV. STAT. (1933) § 40-1-2 (5), (6).

[83]CAL. CIV. CODE (1933) § 60 as amended by Stat. 1933, c. 104; S. D. COMP. LAWS (1929) § 128; WYO. REV. STAT. (1931) § 68-118.

[84]ARIZ. CIV. CODE (1928) § 2166 as amended by Laws 1931, c. 17, § 1; GA. CODE (1933) §§ 53-106, 53-312.

[85]In the thirty-one States and the District of Columbia which have prescribed age limits higher than those of the common law—14 and 12 years respectively for male and female—intra-state marriages of parties between the common law and the statutory ages are voidable by the minor on reaching the statutory age. 9 U. L. A. (1932) 257, n. 11.

In Minnesota and Wisconsin intra-state marriages under the statutory ages are held voidable on the ground that the statute does not declare them void.

now apparently finally answered, the policy is to protect young persons, particularly girls, from marriages made at too early an age provided the marriage has not been consummated.[86] In Oklahoma a declaration of nullity rests, rather, on the theory that the law of the state is injured by an extra-state attempt to evade the law.[87] In Tennessee it has been held that the marriage of a person under the statutory age for marriage will be annulled in Tennessee provided it was voidable under the law of the place of ceremony.[88] On principle it does not seem that a marriage of any persons above the common law age of consent is sufficiently revolting to the sentiment of the people of a state to demand a declaration that an extra-state ceremony is ineffectual. On the other hand the feeling may be that excessively youthful marriages are sufficiently deplorable to demand that they be discouraged by a refusal to lend the aid of the law to the validation of a local ceremony. This conclusion is borne out by the statutes of the several States, of which only nine declare such marriages void or voidable.[89]

The statutes in which the prohibition is attached solely to the performance of ceremonies or to the issuance of licenses in cases

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State v. Lowell, 78 Minn. 166, 88 N. W. 877 (1899); Eliot v. Eliot, 77 Wis. 634, 46 N. W. 806 (1890).

Extra-state marriages within age are valid. McDonald v. McDonald, 42 P. (2d) 362 (Cal. App. 1935); People v. Ham, 206 Ill. App. 543 (1917); Commonwealth v. Graham, 157 Mass. 73, 31 N. E. 706 (1892); Everett v. Morrison, 69 Hun 146 (N. Y. 1893) (decision on the statute of Massachusetts); Perkey v. Perkey, 87 W. Va. 656, 106 S. E. 40 (1921); Swift v. Kelly, 3 Knapp. 257, 12 Eng. Rep. 648 (P. C. 1835); Steele v. Bradwell, Milw. Const. 1 (Ire. 1838). See Lyannes v. Lyannes, 171 Wis. 381, 177 N. W. 683 (1920).

Contra: Smith v. Smith, 84 Ga. 440, 11 S. E. 496 (1890).

[86]Cunningham v. Cunningham, 206 N. Y. 341, 99 N. E. 845 (1912). Compare Bays v. Bays, 165 Misc. 492, 174 N. Y. Supp. 212 (Sup. Ct. 1918) (distinguishing the Cunningham case on the ground of consummation).

Before the decision in the Court of Appeals, the cases in New York were in hopeless conflict. Donohue v. Donohue, 63 Misc. 111, 116 N. Y. Supp. 241 (Sup. Ct. 1909); Mitchell v. Mitchell, 63 Misc. 580, 117 N. Y. Supp. 671 (Sup. Ct. 1909). In the first of these, at Special Term Erie County, an annulment was denied, on the doctrine of the applicability of the law of the place of ceremony and somewhat on the theory that the parties would not be relieved of the consequences of their own fraud. In the second, an annulment was decreed, at Special Term King's County, on the ground that marriage is more a relation than a contract and that the policy of the State was to protect immature persons.

[87]Ross v. Bryant, 90 Okla. 300, 217 Pac. 364 (1923). The court relied on OKLA. COMP. STAT. (1921) § 7488. See OKLA. STAT. (1931) § 1666 as a basis for applying the law of the state to an extra-territorial marriage. The minor was fourteen years of age.

[88]De Fur v. De Fur, 156 Tenn. 634, 4 S. W. (2d) 341 (1928).

[89]GA. CODE (1935) § 10428; KY. STAT. (Carroll, 1930) § 2097; MASS. GEN. LAWS (Ter. ed. 1932) c. 207, § 9; MICH. COMP. LAWS (1929) § 12704 as limited by Act 352 of 1921, p. 643; N. H. PUB. LAWS (1926) c. 280, §§ 4, 5; N. M. STAT. (1929 comp.) § 87-110; N. Y. CONS. LAWS (Cahill, 1930) c. 14, art. 2, § 7; N. C. CODE (1935) § 2495; UTAH REV. STAT. (1933) § 40-1-2(4); VA. CODE (1930) § 5090.

where the parties are within specified ages, show at the most a refusal to give validity to ceremonies in the state.[90] Unless the word "void" is to be given overpowering effect, upon consideration of the attitude shown by a very great majority of the States, statutes which declare such marriages void should be construed as if including the words "if solemnized within this state." It is possible that a different result should be reached in States which have enacted statutes forbidding the issuance of licenses to persons within specified ages, requiring the consent of parent or guardian, and setting ages of consent at younger ages or declaring void all marriages within those younger ages.[91] This possibility arises from

[90]CONN. GEN. STAT. (1930) § 5149; DEL. REV. STAT. (1915) § 2998; D. C. CODE (1929) tit. 14, c. 1, § 10; IDAHO CODE (1932) § 31-202; ILL. REV. STAT. (1935) c. 89, § 3; IND. STAT. (Baldwin, 1934) § 5623; LA. CIV. CODE (Dart, 1932) art. 92 as amended by Act 140 of 1934, § 7; MD. CODE (1924) art. 62, § 7; MISS. CODE (1930) §§ 2362, 2363; PA. STAT. (Purdon, 1930) tit. 48, § 19; R. I. GEN. LAWS (1923) c. 287, § 11; S. C. CODE (1932) § 8558; TENN. CODE (1934) § 8416.

[91]The following statutes declare marriages of persons below certain ages void, and forbid the issuance of licenses without consent of parent or guardian to persons within specified greater ages: KY. STAT. (Carroll, 1930) §§ 2097, 2106; MASS. GEN. LAWS (Ter. ed. 1932) c. 207, §§ 7, 9; N. H. PUB. LAWS (1926) c. 286, §§ 4–8; N. C. CODE (1935) §§ 2494, 2495; UTAH REV. STAT. (1933) §§ 40-1-2(4), 9; VA. CODE (1930) §§ 5078, 5090.

The following establish ages of consent or capacity, and forbid the issuance of license without the consent of parent or guardian to persons under specified greater ages. CAL. CIV. CODE (1933) § 56; GA. CODE (1933) §§ 53-102, 53-207; IDAHO CODE (1932) §§ 31-202, 31-302; MINN. STAT. (Mason, 1927) § 8563; NEB. COMP. STAT. (1929) § 42-102; OHIO CODE (1934) § 11181; OKLA. STAT. (1931) § 1688; ORE. CODE (1930) §§ 33-101, 33-113; S. D. COMP. LAWS (1929) §§ 104, 115; WASH. REV. STAT. (Remington, 1932) §§ 8437, 8431; W. VA. CODE (1932) §§ 4679, 4686; WYO. REV. STAT. (1931) §§ 68-102, 68-105.

The courts uniformly declare valid any extra-state marriages in avoidance of a requirement of consent of parent or guardian, even where expressly evasive. Consent of parent: Steele v. Bradwell, Milw. Const. 1 (Ire. 1838); Schwartz v. Schwartz, 236 Ill. App. 336 (1925); Commonwealth v. Graham, 157 Mass. 73, 31 N. E. 706 (1892). Consent of guardian or spendthrift: Sturgis v. Sturgis, 51 Ore. 10, 93 Pac. 696 (1908); *In re* Chace, 26 R. I. 351, 58 Atl. 978 (1904). The decisions in these cases are put on the ground that the law of the place of contracting determines capacity to contract, Steele v. Bradwell, *supra;* or on the ground that this type of marriage is not within the group of marriages which are contrary to the law of nature and is not declared void if contracted in another state, Sturgis v. Sturgis, *supra.*

In Louisiana the marriage is valid but will not emancipate the infant. Maillefer v. Saillet, 4 La. Ann. 375 (1849); Babin v. LeBlanc, 12 La. Ann. 367 (1857); Clement v. Wafer, 12 La. Ann. 602 (1857); Guillebut v. Grenier, 107 La. 614, 32 So. 283 (1902).

One case has been found which denies validity to such a marriage, Norman v. Norman, 121 Cal. 620, 54 Pac. 143 (1898). The decision in this case is incorrect on principle and on authority. It was based partly on the doctrine that parties cannot, by leaving the state, contract a marriage in fraud of the law of the state; partly on the erroneous doctrine that there is no law on the high seas under which the parties could be married. As to the latter ground, compare Fisher v. Fisher, 250 N. Y. 313, 165 N. E. 460 (1929); Bolmer v. Edsall, 90 N. J. Eq. 299, 166 Atl. 646 (1918); Hayes v. McDermott, 7 Abb. N. C. 98 (N. Y. 1879).

The rule of the civil law is *locus regit actum* with regard to the formalities

recognition of the fact that there may be thus shown a difference of attitude with regard to the two classes of marriages comparable to that shown by the statutes of Pennsylvania covering consanguineous unions.[92]

(*e*) *Marriages Prohibited on Account of Health or Eugenics.* There has been surprisingly little legislation on this subject which seems a matter of the greatest interest to the state to which persons, afflicted with diseases which are transmissible to others with whom sexual intercourse will be had or which may have a deleterious effect on possible issue of the union, look for the creation of the status. Of the twenty States which have enacted statutes showing a policy against the marriages of persons so afflicted only five have expressed an abhorrence great enough to require or even to justify a declaration by the courts that the statutes are intended to apply to extra-territorial ceremonies: Missouri, Rhode Island, Utah and

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of the ceremony, consent of parents or *actes respectueux*, and publication, unless there is evasion of the personal law (generally the national law) of the parties—subjective evasion, in France, objective in Italy. See 1 PLANIOL, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL (8th ed. 1920) No. 1022; 1 COLIN ET CAPITANT, COURS ÉLÉMENTAIRE DE DROIT CIVIL FRANÇAIS (3d ed. 1927) 174; 2 FIORE, DIRITTO INTERNAZIONALE PRIVATO (4th ed. 1904) § 523 (trans. by ANTOINE, DROIT INTERNATIONAL PRIVÉ).

See also Bouly de Lesdain v. Mabel Bailey, 17 Revue de Droit International Privé (Lapradelle) 240 (1919); Giard v. sa femme, *id.* (3me espêce) (1920); Dame Bolo-Soumaille v. Dame Bolo-Muller, *id.* (2e espêce) (1920). In the first of these cases the parties left Pekin, where the man was an attaché of the French Legation, and married by religious ceremony during travels in Mongolia. The court stated that such a marriage would be valid if the parties had been residents of the place of ceremony; but that they left Pekin where the normal legal forms were available to them, that Bouly de Lesdains could not have been ignorant of this; and that the parties having gone collusively to Mongolia, had intentionally committed a fraud on the law—"les parties ont ainsi sciemment fait fraude à la loi":—and held the marriage void. In the second case the parties, one French and one Belgian, went to England to marry in order to avoid the necessity of publication and *actes respectueux*. Here also, on the ground of fraud on the law, the marriage was held void.

In the third case, however, where the requirements omitted were the same as in the second case, the marriage was held valid. The court found that the relations of Bolo with his family and the adventurous nature of the lives of the parties, repelled the conclusion that any deception or fraud on the law was intended.

It is to be noted that the reasoning of the courts in the first two cases suggests that an intentional evasion of a requirement of publicity raises that requirement from a matter of form to a matter of substance. The civil law uniformly refers the validity of a marriage, with regard to matters of substance, to the personal law of the parties, in most countries the national law. 1 PLANIOL, *loc. cit. supra*; SURVILLE, DROIT INTERNATIONAL PRIVE (7th ed.) 408.

[92]See page 108, notes 15–19, *supra*.

West Virginia[93] have enacted statutes declaring such prohibited marriages void, and Vermont[94] has set criminal penalties for the intermarriage of such persons and for their copulation. The terms of the statutes of other states are such that they can be held to apply only to ceremonies within the state. Ten States forbid the issuance of licenses to certain classes of persons;[95] three prohibit the marriage of such persons within the state;[96] one declares such persons incapable of contracting marriage and sets penalties for such marriages;[97] five provide that no marriages shall be contracted between such persons.[98]

The classes of persons forbidden to marry vary from idiots and lunatics;[99] or males (or persons) afflicted with venereal diseases;[100] to common drunkards, habitual criminals, epileptics, imbeciles, idiots or insane persons and persons afflicted with venereal diseases or with pulmonary tuberculosis in its advanced stages.[101] It is possible that the paucity of effective legislation is due to a lay recognition that medical opinion is far from unanimous with regard to the particular types of maladies which should be included

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[93]Mo. Stat. (Perm. ed. 1932) § 2974; R. I. Gen. Laws (1923) c. 287, § 5; Utah Rev. Stat. (1933) § 40-1-2(1).

Even this total is deceptive as the statute of Rhode Island covers only idiots and insane persons, who would probably be incapable of contracting marriage in any state on account of factual lack of capacity to consent.

[94]Vt. Pub. Laws (1933) § 8638.

[95]Ala. Code (1928) §§ 1156, 4383, 4384; Ind. Stat. (Baldwin, 1934) § 5627; N. C. Code (1935) § 2500(a); Ohio Code (1934) § 11187; Ore. Code (1930) § 33-118; Pa. Stat. (Purdon, 1930) tit. 48, §§ 13, 15; Tenn. Code (1934) § 8416; Va. Code (1930) § 5088; Wis. Stat. (1933) §§ 245.10, 245.11; Wyo. Rev. Stat. (1931) §§ 103-226, 103-227.

[96]S. C. Code (1932) § 8566; Wash. Rev. Stat. (Remington, 1932) § 8439. W. Va. Code (1932) § 4701.

[97]Mich. Comp. Laws (1929) § 12695.

[98]Minn. Stat. (Mason, 1927) § 8564; Neb. Comp. Stat. (1929) § 42-102; N. H. Pub. Laws (1926) c. 286, §§ 10, 17–20; N. D. Comp. Laws (1913) § 4373.

[99]Minn. Stat. (Mason, 1927) § 8564 (adds epileptics); Mo. Stat. (Perm. ed. 1932) § 2974 (adds epileptics); Ohio Code (1934) § 11187 (adds epileptics and habitual drunkards); R. I. Gen. Laws (1923) c. 287, § 5; S. C. Code (1932) § 8566; Tenn. Code (1934) § 8416 (adds contemporaneous drunkenness).

[100]Ala. Code (1928) §§ 1156, 4383, 4384; Ore. Code (1930) § 33-118; Vt. Pub. Laws (1933) § 8638; Wis. Stat. (1933) §§ 245.10, 245.11; Wyo. Rev. Stat. (1931) §§ 103-226, 103-227.

[101]N. D. Comp. Laws (1913) § 4373; Wash. Rev. Stat. (Remington, 1932) § 8439. Va. Code (1930) § 5088 omits common drunkards. Ind. Stat. (Baldwin, 1934) § 5627; Mich. Comp. Laws (1929) § 12695; Neb. Comp. Stat. (1929) § 42-102; N. H. Pub. Laws (1926) c. 286, § 10, 17; N. C. Code (1935) § 2500(a); Pa. Stat. (Purdon, 1930) tit. 48, § 15; Utah Rev. Stat. (1933) § 40-1-2(1); W. Va. Code (1932) § 4701 omit common drunkards and habitual criminals.

The statutes of New Hampshire, North Dakota, Utah, Virginia and Washington except from the prohibition all cases where the woman is over forty-five years of age.

in the prohibitions and that this recognition is shown by the variations in the statutes.

Turning to the books, we find a corresponding paucity of cases. Three cases of attack on the validity of such extra-state marriages have been found—all in Wisconsin.[102] Two cases in which the parties, of whom one was epileptic, left Wisconsin to have a ceremony performed in Minnesota, came before the court in 1918 and 1919. In the earlier,[103] the statutes of Minnesota—making the marriage of epileptics voidable—and the statute of Wisconsin prohibiting marriages of insane persons and idiots[104] were shown. The decision, declaring the marriage null and void, was properly based on the great interest of the state in marriage as a social institution; an interest expressly recognized by the legislature through the enactment of the Declaratory Judgments Statute.[105] In the second case[106] the laws of Minnesota were not shown and, since the statute then in force in Wisconsin forbade the marriage of epileptics but did not declare such marriages void,[107] the court held the marriage valid. The distinction between the two cases is that, in the second, one party was innocent, while in the first both knew of the epilepsy. This is not a valid reason for a different result; for, the interest of the state in this type of marriage does not depend on the subjective innocence of one or both parties, but upon the physical or mental qualities of the persons who will form the new family within its borders. If the attitude of the court in the first case was correct—judicial notice was there taken that, while there is a distinction in the legal and medical sciences between epilepsy and insanity, the latter "is a serious mental disease and tends to weaken the power of the afflicted person and to injure his posterity"[108]—then the finding of the lower court in the second case that Jansa was not insane at the time of his marriage should not have so strongly influenced the Supreme Court, particularly as it appeared that his mind was to some extent affected.[109]

The third case[110] concerned an extra-state ceremony in evasion of the requirement of the Eugenic Marriage Law of Wisconsin.[111] This statute requires all male applicants for marriage licenses to

[102]True v. Ranney, 21 N. H. 52 (1850), is not truly representative of this class of cases, as the marriage was undoubtedly void at the place of ceremony, for idiotic lack of capacity.

[103]Kitzman v. Werner, 167 Wis. 308, 166 N. W. 789 (1918).

[104]MINN. STAT. (1913) §§ 7106, 7090; WIS. STAT. (1911) § 2330.

[105]WIS. STAT. (1915) § 2352.

[106]*In re* Jansa's Estate, 169 Wis. 220, 171 N. W. 947 (1919).

[107]WIS. STAT. (1916) § 4593m.

[108]See Kitzman v. Werner, 167 Wis. 308, 315, 166 N. W. 789, 792 (1918).

[109]See *In re* Jansa's Estate, 169 Wis. 220, 221, 171 N. W. 947, 948 (1919).

[110]Lyannes v. Lyannes, 171 Wis. 381, 177 N. W. 683 (1920).

[111]WIS. STAT. (1919) § 2339m.

be examined for the existence or non-existence of venereal disease and forbids the issuing officials to issue a license unless there has been presented and filed with the official a certificate showing freedom from such disease. There are also provisions for certificates from physicians licensed to practice in the State or in the State where the man resides, and for penalties on physicians who knowingly make false statements in such certificates and on officials who issue licenses without certificates.

The case was fully argued to the effect that this marriage was void for the following reasons: (1) The penalty for failure to file a certificate within one year from the date of return to the state after a marriage in evasion of the law set up by the Laws of 1913[112] was repealed by the Laws of 1915[113] and did not exist at the time of this marriage or of the trial. (2) This showed an intention to remove the prohibition from the penal class and to make it prohibitive and disabling. (3) By the same Laws[114] the Uniform Marriage Evasion Act was adopted. The court took note of this argument but felt, however, forced to the conclusion that no extra-territorial effect could be given "to this eugenic marriage requirement of an antenuptial physical examination . . . [for the reason that] the requirement of the examination under this law is made obligatory upon . . . an applicant for a marriage license, and this must be construed to refer to the applicant for a marriage license in this state." The court also noted that concealment of venereal disease is sufficient fraud to ground annulment at the suit of the innocent party.[115]

While a different result might have been preferable in this case, it is difficult to see how the court could have reached such a decision. It is correct that any prohibition attached solely to the application for and issuance of a license be held to have only a territorial application. Contemporary criticism seems to rest rather upon a desire to see an end attained than upon a justifiable attack upon the reasoning of the court. This criticism was upon the following grounds:[116] (1) The repeal of the provision of the Laws of 1913 which allowed later compliance with the terms of the Eugenic Act, must have shown an intention to have the Uniform Marriage Evasion Act apply to evasions of the ante-nuptial examination requirement in an attempt to compel examination before every marriage, thus protecting the woman from exposure. (2) The enumeration of various immaterial irregularities, all pertaining to marriage licenses and not to the examination, showed an intention to

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[112]c. 738, § 1, sub. 5.
[113]c. 525.
[114]Laws 1915, c. 270.
[115]C— v. C—, 158 Wis. 301, 304, 148 N. W. 865, 866 (1914).
[116]See (1920) 1 WIS. L. REV. 53.

make the examination essential and evasion of the requirement grounds for a declaration of nullity. (3) The only statute in existence in Wisconsin which declared any marriages void had already been held by the court to have extra-territorial effect, and if the Evasion Act did not apply to this particular type of marriage it would be merely surplusage. The critic then suggested the enactment of legislation making marriages in evasion of this statute null and void, in order to protect the other party from infection.

It is apparent that the terms of the Evasion Act of Wisconsin could not properly be applied to the Eugenic Act, as the latter did not declare marriages in violation thereof to be void; that a decision declaring this marriage void would have been judicial legislation; and that the suggested legislation is the only method of reaching the result desired by the critic.

The great interest of each state in the health of its citizens should lead to the enactment of statutes of the following type. Such acts should include: 1. An absolute prohibition, having extra-territorial effect, of marriages between persons either of whom is afflicted with any contagious venereal disease; 2. An absolute prohibition, having extra-territorial effect, of marriages of parties who fall within the classes of persons whose issue may be deleteriously affected,[117] the right to attack such marriages being given to either party and to the guardian of either, and a power given to and a duty imposed upon an appropriate public official to attack them; 3. The imposition of criminal penalties for the sexual intercourse of any person knowingly afflicted with either class of disability.[118]

(*f*) *Intentional Evasion of State Laws.* A very considerable number of cases has been found in which the court mentioned the fact that the parties had left one State in order to have a ceremony in another for the purpose of evading the laws of the first. In some of these cases the court said that the intention to evade was material, in others that it was immaterial.

On principle, a subjective intent to evade the marriage laws of a state is entirely immaterial. The interest of the state in mar-

[117]In this connection the writer again emphasizes the fact that it is not within the scope of this article to criticize the position taken by any state. Insofar as the principles of the conflict of laws are concerned, the province of the court of the forum is only to apply the law of the state most interested.

[118]This criminal statute is suggested in order to strengthen the indications that it is the intention of the legislature to regulate extra-state ceremonies of persons who intend to live in the State.

riage as a social institution, the source of a new family and new citizens overpowers the interest in the sanctity of its law as a political institution, and only an undue legislative pride leads to a declaration of nullity or an annulment solely or principally on the basis of a subjective evasion.

In nearly all of the cases the actual decisions have harmonized with this conclusion. In those where the marriage has been held valid, the prohibition has been of a type of marriage which was not abhorrent to the people of the state,[119] or the parties have not intended to make their matrimonial domicil in the State.[120] Where the marriage has been held void it has been of a type abhorred by the people of the State,[121] or the court has felt compelled by the existence of an evasion statute.[122]

Two cases of miscegenation in North Carolina are to be contrasted, *State v. Ross*[123] and *State v. Kennedy*.[124] Both were tried in the same term before Schenck, J., of the Mecklenburg Superior Court and were reported consecutively in North Carolina Reports. In the first it appeared that a white woman, domiciled in North Carolina went to South Carolina to marry a negro there domiciled and that there was, at the time of the ceremony, no intention to live as husband and wife in North Carolina. A holding by Schenck, J., that the defendants were not guilty of fornication and adultery

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[119]In the following cases it was said that an intent to evade was immaterial. Statute concerning: consent of parent or guardian, McDonald v. McDonald, 42 P. (2d) 362 (Cal. App. 1935); Commonwealth v. Graham, 157 Mass. 73, 31 N. E. 706 (1892); Levy v. Downing, 213 Mass. 334, 100 N. E. 638 (1913); Sturgis v. Sturgis, 51 Ore. 10, 93 Pac. 696 (1908): marriage within age and consent of parent, Steele v. Bradwell, Milw. Const. 1 (Ire. 1838): prohibition of remarriage of guilty party to suit for divorce, Van Voorhis v. Brintnall, 86 N. Y. 18 (1881); State v. Shattuck, 69 Vt. 403, 38 Atl. 81 (1897): prohibition of consanguineous marriage, Fensterwald v. Burke, 129 Md. 131, 98 Atl. 358 (1916); Leefield v. Leefield, 85 Ore. 287, 166 Pac. 953 (1917); Schofield v. Schofield, 51 Pa. Super. Ct. 564 (1912). In Perkey v. Perkey, 87 W. Va. 656, 106 S. E. 40 (1921) (marriage within age), it was said that the absence of an intention to evade was material.

[120]In the following cases it was said that the absence of an intention to evade was material. Statute prohibiting the remarriage, within a period, of either party to a suit for divorce: Nelson v. Nelson, 200 Ill. App. 584 (1916); Harvey v. State, 31 Okla. Cr. App. 299, 238 Pac. 862 (1925).

[121]In the following cases it was said that an intention to evade was material. Statutes concerning: Remarriage with paramour, Succession of Gabisso, 119 La. 704, 44 So. 438 (1907); *In re* Stull's Estate, 183 Pa. 635, 39 Atl. 16 (1898): Miscegenation, *Ex parte* Kinney, 3 Hughes 9, Fed. Cas. No. 7825 (C. C. Va. 1819); Eggers v. Olson, 104 Okla. 297, 231 Pac. 483 (1924); Pennegar v. State, 87 Tenn. 244, 10 S. W. 305 (1889).

As to the French doctrine with respect to subjective evasion, see note 91, *supra*.

[122]Smith v. Smith, 84 Ga. 440, 11 S. E. 496 (1890) (marriage within age). See also the Massachusetts cases in notes 134, 135, 136, *infra*.

[123]76 N. C. 242 (1877).

[124]76 N. C. 251 (1877).

under the North Carolina statute was affirmed on the ground that there was no evasion of the law of that State. The facts in the second case showed that the parties, a negro man and a white woman, went to South Carolina to marry with the intention to return, and that there was an immediate return, to North Carolina. A conviction by the same judge under the same statute was upheld, apparently on the basis of an objective evasion of the law of the latter State, Rodman, J., saying:[125] "A law like this of ours would be very idle if it could be avoided by merely stepping over an imaginary line."

Turning to the statutes we find four types of acts covering the effect of extra-state ceremonies with respect to the validity of the marriage: 1. Statutes enacting the common law doctrine;[126] 2. Those enacting a subjective test of evasion;[127] 3. Those enacting the objective test;[128] 4. Those covering all extra-state ceremonies.[129] Of the eight States where statutes of the first type have been enacted, in only two, California and Colorado, has any stress been placed upon the existence of the act.[130]

The history of the cases and of legislation in Massachusetts vividly exemplifies the general attitude toward evasion. The first mention of intention to evade is found in *Putnam v. Putnam*,[131] decided in 1829. The case was that two persons, of whom one was forbidden to remarry within two years after divorce, left the State in order to marry in another for the purpose of avoiding the operation of the prohibition. The court, holding the marriage valid, said, through Parker, J.: "If it shall be found inconvenient, or repugnant to sound principle, it may be expected that the legisla-

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[125]76 N. C. 251, 253 (1877).

[126]CAL. CIV. CODE (1933) § 63; COLO. COMP. LAWS (1921) § 5550; CONN. GEN. STAT. (1930) § 5150; IDAHO CODE (1932) § 13-209; KY. STAT. (Carroll, 1930) § 2601; MONT. REV. CODE (1921) § 5707 (excepts miscegenation); NEB. COMP. STAT. (1929) § 42-117; N. M. STAT. (1929 comp.) § 87-105; N. D. COMP. LAWS (1913) § 4366; UTAH REV. STAT. (1933) § 40-1-4; WYO. REV. STAT. (1931) § 68-117. ARK. DIG. STAT. (Crawford & Moses, 1921) § 7043 applies expressly only to marriages valid by the law of the state in which the parties actually resided at the time of the ceremony.

[127]IND. STAT. (Baldwin, 1934) § 5629; ME. REV. STAT. (1930) c. 72, § 9; W. VA. CODE (1932) § 4695.

[128]D. C. CODE (1929) tit. 14, c. 1, § 5; ILL. REV. STAT. (1935) c. 89, §§ 19–24; LA. CIV. CODE (Dart, 1932) art. 113; MASS. GEN. LAWS (Ter. ed. 1932) c. 207, §§ 10–13, 50; MISS. CODE (1930) § 2361; MONT. REV. CODE (1921) § 5703 (covers miscegenation only); VT. PUB. LAWS (1933) §§ 3066, 3067; VA. CODE (1930) § 5089 (covers miscegenation only); WIS. STAT. (1933) § 245.04(1), (2).

[129]ARIZ. CIV. CODE (1928) § 2167; DEL. REV. STAT. (1913) § 2992; GA. CODE (1933) § 53-214.

[130]See *In re* Wood's Estate, 137 Cal. 129, 69 Pac. 900, 902 (1902), and Loth v. Loth's Estate, 54 Colo. 200, 202, 129 Pac. 827 (1913). Compare, however, *In re* Wood's Estate, *supra*, 69 Pac. at 906 (per Harrison, J., in dissent).

[131]18 Pick. 433, 435. (Mass. 1829).

ture will explicitly enact, that marriages contracted in another State, which if entered into here would be void, shall have no force within this Commonwealth." Seven years later, the legislature enacted the first of the Marriage Evasion Acts of Massachusetts, an act embodying the test of subjective intent to evade.[132] In 1882 there was enacted a statute which differed slightly in form, but which still contained the subjective element.[133] Under this second act, two cases came before the court with facts identical, except that in one[134] both parties took legal advice before leaving the State for the ceremony, while in the other[135] only one party intended to evade. The marriage was held void in the first case and valid in the second, the court expressly distinguishing the first on the ground that the parties in the former both intended to evade the Massachusetts prohibition. In 1913 the Uniform Marriage Evasion Act was adopted; an act which makes the test of evasion objective rather than subjective—that is, the test is whether there is an intention to return and reside in the State, not whether there is an intention to evade the laws of the State. While this statute was in force, the court said, in *Palmer v. Palmer*:[136] "Apart from statute, if the parties go into another state for the purpose of evading the law, and enter a marriage valid by the law of that state, the marriage is valid here." The words of Pierce, J., speaking for the court in *Murphy v. Murphy*,[137] perhaps indicate that the decisions of the court of Massachusetts will engraft the traditional subjective test of that State on the terms of the objective statute. He said: "The statute is applicable if either of the contracting parties 'residing and intending to continue to reside in this Commonwealth' goes into another jurisdiction *with intent to evade*[138] the provisions of the marriage laws of this Commonwealth. This language distinguishes the existing statute from the statute[139] which required

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[132]REV. STAT., c. 75, § 6: "When any persons, resident in this state, shall undertake to contract a marriage, contrary to the preceding provisions of this chapter [covering consanguinity, idiocy and insanity, and remarriage during the life of a former wife or husband] and shall, in order to evade those provisions, and with an intention of returning to reside in this state, go into another state or country, and there have their marriage solemnized, and shall afterwards return and reside here, such marriage shall be deemed void in this state."

[133]Pub. Stats., c. 145, § 10.

[134]Tyler v. Tyler, 170 Mass. 150, 48 N. E. 1075 (1898).

[135]Whippen v. Whippen, 171 Mass. 560, 51 N. E. 174 (1898).

[136]265 Mass. 242, 163 N. E. 879 (1928).

[137]249 Mass. 552, 144 N. E. 394 (1924).

[138]This unfortunate language was quoted with approval by the court of Vermont with regard to the same statute as enacted in that State. See Wheelock v. Wheelock, 103 Vt. 417, 154 Atl. 665 (1931).

It is noteworthy that the draft of this Act, circulated in 1912 for criticisms and suggestions contained a subjective test of evasion, but that, as enacted, the subjective test was eliminated.

[139]REV. STATS., c. 75, § 6. See note 132, *supra*.

action by both parties . . . if the inhibition of the statute was to be applied."

Such a construction of the Uniform Marriage Evasion Act is unduly restrictive and the subjective element should be confined to that set forth in the Act itself—namely an intent to return and reside in the State.[140]

Conclusion

> "What might be deemed a mere regulation in one state might be regarded as a matter affecting the morals and good order of society in another."[141]

It is evident that all the States agree that those marriages which may have a deleterious effect upon the morals and good order of society are so evil that the state most vitally interested in the claim of a man and woman of certain classes to *be married* will refuse to create the status of marriage, to allow the creation of a new family within its boundaries, whether the parties go through an otherwise effective ceremony within the state or go to another state, which does not have the same attitude, in order to *get married.* No state will allow the forms of its marriage law to be used as a basis for violation of its law,[142] nor will a state allow its fundamental marriage law to be violated through the use of the forms of the law of another state. The classical doctrine of the common law—a marriage valid by the law of the state in which it is solemnized is everywhere valid—represents merely a statement that most unions are not odious to any state and that, consequently, a marriage is to be deemed valid unless it appear that the formation of a new family consisting of the particular man and woman and their possible offspring will vitally offend the religious, moral or economic sensibilities of the people of the state to which that man and woman look for the creation of the status of marriage and will thus violate the fundamental policy of the state.[143]

Marriages of persons who are related to each other within certain degrees come within the category of odious unions; as do marriages with a paramour after divorce, or with any person within a too short period after the decree of divorce; intermarriages of persons of different races; marriages at too youthful ages; and marriages which will endanger the health of one spouse or have a deleterious effect upon possible issue.

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[140]This is the position taken by the courts of Illinois [Lehman v. Lehman, 225 Ill. App. 513 (1922)], a position foreshadowed by a case holding valid a marriage contracted before the enactment of the Uniform Act in that State. [Nelson v. Nelson, 200 Ill. App. 584 (1916)].

[141]Per Folkes, J., in Pennegar v. State, 87 Tenn. 244, 254, 10 S. W. 305, 308 (1889).

[142]Cheshire, *op. cit. supra* note 72, at 156.

[143]See Brook v. Brook, 9 H. L. Cas. 193, 212 (1861).

Within the first group, odious consanguineous unions, must be placed marriages between persons in the direct line of ascent and descent, between brother and sister—all this by the common law—and marriages between uncle and niece or aunt and nephew. While it is true that the latter relationships do not come within the prohibition of the common law, they are very close to it.[144] As the statutes of twenty-six States declare such marriages incestuous and those of ten more States declare them void, the unions of uncle-niece and aunt-nephew are sufficiently contrary to the religious and moral sentiments of those thirty-six States to require the conclusion that persons who look to any one of those States for the creation of the status cannot marry each other, no matter where the ceremony takes place. We have here, not the common consent of Christian nations but the common consent of a large proportion of States of the United States. Since only twelve States declare the marriage of first cousins incestuous[145] and only ten declare them void,[146] there is not sufficient evidence of odiousness to require or allow of declaration of nullity in any State other than the first twelve, in cases of extra-state ceremonies.

It is probable that the different attitudes toward marriages within the Levitical degrees and toward those of first cousins is to be accounted for by religious and moral sentiments coupled with a more or less conscious idea of eugenic control.[147]

In all the states which prohibit remarriage with a paramour during the life of the innocent spouse after divorce the agreement is perfect. All their courts recognize that the sentiment of the people is offended by such remarriage. It is difficult to classify this type of marriage as sufficiently contrary to religion or morality, to require such unanimity. It is probable, however, that the true reason combines a shock to religious and moral sentiments with a desire to strengthen the motives impelling to marital fidelity by making it impossible for the potentially wandering spouse, during the life of the injured spouse, to marry the cause of the temptation to infidelity.

The variation in degree of reprehension felt for the guilty spouse in any marriage which is destroyed by divorce is shown by

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[144]See Incuria v. Incuria, 155 Misc. 755, 280 N. Y. Supp. 716, 719 (Dom. Rel. Ct. 1935), where Parker, J., cited § 5 of the Domestic Relations Law of New York. See CONS. LAWS (Cahill, 1930) c. 14, art. 2, § 5, and LEVITICUS, XVIII, 12, 13, XX, 19.

[145]These are Ariz., Ark., Alaska, Kan., Ky., Miss., N. H., N. D., Okla., S. D., Utah and Wash.

[146]These are D. C., Ind., Iowa, La., Mo., Mont., Neb., Nev., Pa., and Wyo.

[147]See Johnson v. Johnson, 57 Wash. 89, 91, 106 Pac. 500, 501 (1910), where Rudkin, C. J., said: "If argument in support of such a policy be needed, the fact that the only offspring of this marriage is deaf and dumb supplies it."

the variations in statutes prohibiting, for a stated period—from a year or two after decree up to the life of the innocent spouse—the remarriage of that person with any other person. The same variation is shown in statutes prohibiting the remarriage, for a period, of either party to a divorce, and in those which put an end to all incidents of the marriage but do not dissolve the tie, thus sustaining the status, for the stated period.

It is probable that the underlying purpose is two-fold. First: The sentiment of a community may be shocked by the return of a divorced person to live with a new spouse in that community within so short a time that it may appear that the desire for marriage with that new spouse was one of the causes of the divorce.[148] Second: If a considerable time must elapse after decree before a new marriage is possible, there may be less temptation to divorce.[149]

In cases of miscegenous marriages, also, the prohibiting States are, with the exception of Nebraska, unanimous. Such unions are so odious to the people of the State in which the new family intends to live that no validity will be allowed to the marriage. The abhorrence of miscegenation in the southern, western and middle-western States probably arises from a combination of aesthetic, eugenic and economic considerations.

Marriages of persons of extremely youthful ages undergo a variety of treatment depending upon the strength of the belief of the court that declarations of nullity will be effective to protect such persons from unwise marriages. Only three states have held such marriages invalid; and in one, New York, the marriage is invalid only if not consummated. Few of the statutes offer support for an argument that a solemnization actually taking place in a state which does not forbid such marriages is ineffective as a basis for the creation of the status.

Marriages of persons afflicted with epilepsy, tuberculosis or venereal disease, or of persons in whom there appears evidence of some characteristic which the state fears transmissible, habitual drunkenness or criminality, or of those who are mentally defective are decried by the statutes of many states. There is, however, little apparent abhorrence strong enough to require declarations

[148]It is only in Illinois that a prohibition of this nature is applied to a remarriage after a divorce granted in any State other than that to which the new family goes to live. See note 64, *supra*.

[149]Compare the quotation from Heflinger v. Heflinger, 136 Va. 289, 297, 118 S. E. 316, 318 (1923), appearing in the text at note 63, *supra*.

Where the statute forbids remarriage within the time allowed for appeal from the decree there may be also a purpose to avoid the necessity of deciding whether a person can have two lawful spouses at the same time.

that the extra-state marriages of such persons are void. It is possible that this lack of apparent abomination arises from a realization that not enough is yet known to justify the inclusion in the prohibition of defects which may or may not be inheritable, and that marriages of mental defectives will probably be void for lack of capacity to assent to the marriage contract. This, however, is not true of any infectious venereal disease and it is surprising that more states have not enacted laws, with respect to the marriage of such persons, which would deny effectiveness to attempted marriages of persons who intended to live within the state, no matter where the solemnization occurred.

The doctrine may be stated as follows: the law of the state which will be most closely connected with the new family, the state to which the parties look for the creation of the status, must be looked to in order to determine the validity of the marriage so far as matters of substance are concerned and the law of the place of ceremony is to be looked to in order to determine matters of form. It can, then, be held that a state which enacts a statute applying expressly to extra-state ceremonies, by that enactment raises that which was before a matter of form to the level of a matter of substance. A declaration that, as between persons intending to reside in the state, a marriage, which is declared void by the laws of the state, shall be void as if entered into within the state is a clear declaration that all such marriages are odious to its law. Such a declaration makes it evident that such a union is considered by the state as "contrary to . . . its fundamental institutions."[150]

[150]Per Lord Campbell, in Brook v. Brook, 9 H. L. Cas. 193, 212 (1861).

AN EVALUATION OF CHIEF JUSTICE WHITE

*Lewis C. Cassidy**

A colleague said of Edward Douglass White, ninth Chief Justice of the United States, that "as he has attained, so he will forever keep, a distinct eminence among the chief justices,"[1] yet the attitude of White towards himself was, in Carlyle's phrase, one of "noble unconsciousness," for he "had no suspicion of his being particularly sincere; of his being particularly anything."[2] One may search in vain for the terse in his opinions, while that pleasing faculty was habitual with Holmes. For these reasons the study of his antecedents and career itself has been neglected, but there has never been any doubt about the purpose of his opinions. His objectives on the bench were two-fold: (1) To maintain the power of the general government when the issue was national and should be solved from that point of view; and (2) To a large extent to resort to an eighteenth century natural law technique in his interpretation of the "due process" clause of the Fourteenth Amendment.

The education of a jurist, like that of everyone else, commences before his birth, and "Solomon's justice," advised Mark Twain, "depends upon how Solomon is raised."[3] White's earliest American ancestor was Thomas Willcox of Exeter, Devonshire, whose paper mill[4] on the west branch of the Chester Creek in Delaware County (then part of Chester County), Pennsylvania, supplied the paper for the Continental currency. His daughter Ann, in 1747, married James White, a Philadelphia merchant born in Ireland, she being seventeen and he twenty-six. This couple were White's great grandparents. It did not require much persuasion to induce James White to sign the Non-Importation Agreement of 1765 and upon his death three years later his only son, James, received four hundred pounds, all his Latin books and his negro Chloe.

The second James White lived a most eventful life. After his birth in Philadelphia in 1749 he became a student in the oldest parochial school in the Colonies, towards whose establishment his father had been a generous contributor. Thereafter he studied in France at the College of St. Omer where well-to-do English and Irish youths were accustomed to study during penal times. Upon his return to Philadelphia he studied medicine at the University of Pennsylvania and took his degree, but before long he journeyed to

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[1]McKenna, J., 256 U. S. vii (1922).

[2]Carlyle, On Heroes, Hero-Worship and the Heroic in History (1841) 208.

[3]Haines, The American Doctrine of Judicial Supremacy (1932) 478.

[4]The third oldest in the Colonies.

Fayetteville, North Carolina, where some of his mother's family had established an iron foundry. He became a lawyer and was probably self-taught, but the circumstances are unknown as well as the extent of his military service. In 1786 he was a member of the North Carolina legislature and the following year was elected to the Continental Congress where he served two years while the Congress was sitting in New York City. When western North Carolina became the Territory of Davidson County in 1794 he served in her legislature and again was elevated to Congress, serving under the new Constitution as a delegate for the Territory South of the River Ohio from 1794 to 1796 when Tennessee was admitted to statehood with Andrew Jackson as one of her senators. It is not clear why White decided to leave the United States and to settle in French territory in 1799. Perhaps he felt it inevitable that Louisiana should become part of the United States as it did four years later. His colorful career was rounded out with a five year period of judicial service and he died in St. Martinville in 1809. His son and grandson likewise were to serve in Congress and on the bench.[5]

James White's only son was Edward Douglass White the First, who was born in Nashville, Tennessee, in 1795. His mother's name was probably Douglass. The characteristic indifference of Chief Justice White to family genealogy explains the hiatus, but his father's career was not less fascinating than his grandfather's. At the age of twenty he was graduated from the University of Nashville, Tennessee, although his father had introduced the bill which established the University of Greenville, Tennessee. Returning an orphan to Louisiana, the elder Edward Douglass White studied law with Judge Alexander Porter who was born in Ireland and was one of the two associates of Chief Justice Francis X. Martin upon the Supreme Court of Louisiana, the Chief Justice being a native of France. Martin translated and published *Pothier on Obligations* in 1804 while working as a printer in New Berne, North Carolina.

After practicing law in Donaldsonville White was appointed judge of the city court of New Orleans and moved there in 1825. Four years later he defeated the eminent Edward Livingston[6] for Congress, but that versatile statesman was immediately elected to the Senate after the minor defeat and remained there until 1831 when he became Secretary of State. Elected as a Whig, White was given a rare opportunity to vindicate his political philosophy when in the Twenty-first Congress the House Committee on the Judiciary voted to repeal the twenty-fifth section of the Judiciary Act of

[5]Biographical Directory of the American Congress (1928) 1689, 1691.

[6]Hunt, *Life and Services of Edward Livingston* (1903) La. B. A. Proc. 7–50.

September 4, 1789. This section provided that where in "A final judgment . . . is drawn in question the validity of, or an authority exercised under, the United States, and the decision is against their validity, . . . [it] may be examined and reversed or affirmed in the Supreme Court of the United States, upon a writ of error."[7] The report was rejected in the House by a vote of 138 to 51. The majority report contended that "if the power claimed for the Supreme Court be submitted to, and the twenty-fifth section of the judicial act be continued as a part of the judicial system of the United States, that court will have the power, without any possible check, to encroach upon the other political departments of the Government."[8] The Committee's minority report was signed by James Buchanan, William W. Ellsworth and Edward Douglass White, and "must be regarded as one of the great and signal documents in the history of American constitutional law."[9] While it was probably drafted by Buchanan, no information is available to determine the share of each signer in its composition.[10] It opposed the repeal because its removal "would seriously endanger the existence of this Union," for "when an individual claims any right before a state court, under the Constitution or laws of the United States, and the decision is against his claim, he may appeal to the Supreme Court of the United States. If this section were repealed, all these important individual rights would be forfeited." In conclusion the signers related that "All uniformity in their construction would thus be destroyed." This was undoubtedly true, as the state courts would differ in their interpretations. "Besides," it continued, "we might, if this were the case, get into serious conflicts with foreign nations, as a treaty might receive one construction in Pennsylvania, another in Virginia, and a third in New York. Some common and uniform standard of construction was absolutely necessary."

White served through the Twenty-first and Twenty-second Congresses and resigned in 1834, during the Twenty-third Congress, to assume the governorship of Louisiana to which the Whigs had elected him. In his inaugural address to the legislature on February 2, 1835, White stressed the state's regret at the reduction of the duty on sugar, but thought that "the inherent industry of the people" would overcome this disadvantage. The Governor himself was a sugar planter. His message of January 4, 1836, after reciting that Louisiana had furnished her quota for the war against the Seminole Indians of Florida, referred ominously to the

[7] 1 Stat. 85 (1789), 28 U. S. C. A. § 344 (1926).

[8] H. R. Rep. No. 43, 21st Cong., 2d Sess. (1931); Works of James Buchanan, ii (1908) 56–80; 7 Register of Debates (1831) lxxvii.

[9] 2 Warren, Supreme Court in U. S. History (1926) 739.

[10] Curtis, Life of James Buchanan (1883).

"incendiary compositions," which the Abolitionists were sending into the state. He predicted that if the Abolitionists succeeded they would "inundate the land with human blood." Within five years of signing a report in favor of federal judicial supremacy within the meaning of the Judiciary Act, White urged the passage of a resolution which he signed after its passage, and which was also of signal import. It endorsed the resolutions of South Carolina and Kentucky proposing a convention of slave-holding states "to inquire into and determine one of the best possible means to obtain peaceably if they can, forcibly if they must, that respect for their institutions to which they were entitled by the positive enactment of the Federal compact and by the stronger law of self-preservation."[11]

As an example of the fluctuation of congressional and state practice before the Civil War, Henry Cabot Lodge wrote that when his father, John E. Lodge, lived in Louisiana and wished to go abroad, he obtained a passport which was signed by Governor Edward Douglass White.[12]

After his four year term of office expired in 1838, White was re-elected to the Twenty-sixth and Twenty-seventh Congresses, but suffered defeat when he sought election in 1842 to the Twenty-eighth Congress.

Governor White had married in Washington the daughter of Tench Ringgold, Catherine Sidney Lee Ringgold, and had four children, the youngest of whom was Edward Douglass White, Junior, who was born in Thibodaux, LeFourche parish, Louisiana, on November 3, 1845. Tench Ringgold was marshal of the District of Columbia and of the Supreme Court of the United States and he earned the written appreciation of John Marshall. His brother, Major Samuel Ringgold, had served with distinction in the Mexican War.

A boat exploded on the Red River while White was a passenger and he was almost drowned. This experience, together with his defeat for Congress and an indebtedness of $40,000 on his plantation, hastened his death which occurred in 1847.

Sir Frederick Pollock[13] was thirty-seven days younger than Chief Justice White, but one's life was spent in a country with settled traditions, while the other was part of a movement which within one generation almost subdued a continent. When Pollock at sixteen was in his third year at Eton, White was serving in a

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[11]La. Acts 1838, pp. 18–19.

[12]Lodge, Early Memories (1913) 34.

[13]Pollock, For My Grandson (1934) xv.

Confederate infantry company. Out of rich but different experiences, one collaborated with Maitland to write a great history of English Law, edited the Law Reports and wrote standard treatises on Contracts and Torts, while the other, who never learned to write well, yet with clearness of vision, as a member of the Supreme Court, helped to guide the destiny of a great nation, and the Court's prestige was never greater than when he left it in 1921.

After Governor White's death his wife married Ringgold Brousseau and the children were educated in New Orleans, but in 1856 Edward Douglass White and his elder brother James journeyed to Emmitsburg, Maryland, to enroll in Mount St. Mary's College, which operated a preparatory department. Seven years later, at a point ten miles north of Emmitsburg, was fought the Battle of Gettysburg.

Both boys did well in their studies, but remained only two years. A catalogue of the period recorded that both received honorable mention for their work in English grammar and history, while in arithmetic "Ned" White received second honors. In the fall of 1858 both boys entered the preparatory department of Georgetown College, and in the following year the younger White became a member of the class of 1863. He was a member of the cadet corps. When the college was visited in 1861 by Captain F. E. Prime of the War Department, who sought to examine the site for billets and observation points, situated as it was high above the Potomac River, the students, most of whom were from southern homes, gathered about him and gave "Three cheers for Jeff Davis and the Confederacy." On February 18, 1861, the Louisiana legislature had declared "That any attempt to force or coerce a sovereign state to remain within the Federal Union, come from what quarter or whatever pretense it may, will be viewed by the people of Louisiana, as well on her own account as all her sister Southern States, as a hostile invasion and resisted to the utmost extent."[14] It was inevitable that a patriotic young student should leave his books and prospect of becoming a junior when his native state had spoken so unequivocally.

It is almost impossible to recount White's service in the Confederate Army because of his own reticence and the destruction of Confederate military records. Our knowledge of Confederate tactics is derived from the reports of staff officers and the reminiscences of participants. The elder Oliver Wendell Holmes portrayed a memorable picture of the youthful southern soldier in his story: "My Hunt after 'The Captain,' "[15] for, upon hearing that his son

[14]Act of Secession, 1861.

[15]HOLMES, PAGES FROM AN OLD VOLUME OF LIFE (1891) 61.

Oliver Wendell Holmes had been wounded at Antietam and was unaccounted for, he hurried from Boston to the Maryland battlefield. "We were just leaving when a face attracted me. 'That is the true Southern type,' I said to my companion. A young fellow, a little over twenty, rather tall, slight, with a perfectly smooth boyish cheek, delicate, somewhat high features, and a fine, almost feminine mouth, stood at the opening of his tent . . . He was from Mississippi, he said, had been at Georgetown College. 'Did you ever see a genuine Yankee?' said my Philadelphia friend to the young Mississippian. 'I have shot at a good many of them,' he replied modestly, his woman's mouth stirring a little, with a pleasant, dangerous smile."

White referred to this period in 1912 when he responded to the toast "The Supreme Court of the United States," in the most inspired utterance of his life: "I can in recollection recall the day when to me it [the flag] was but the emblem of darkness, of misery, of suffering, of despair and despotism. But ah, in the clarified vision in which it is now given to me to see it, as I look upon its azure field, it is resplendent with the Southern Cross, and as I contemplate its stripes, they serve to mark the broad way for the advance of a mighty people, blessed with that plentitude of liberty, tempered with justice and self-restraint, essential to the protection of the rights of all."[16]

The first week of July, 1863, was the turning point of the Civil War.[17] During the first three days Gettysburg was fought and on July 4, 1863, General Grant occupied Vicksburg and received the surrender of General Pemberton's troops. Port Hudson, further south on the Mississippi River, with "works almost as strong," surrendered on July 9 when it learned the fate of Vicksburg, but it had withstood six weeks of siege and two assaults. General Nathaniel P. Banks received over 6,340 soldiers as prisoners, who were paroled, 51 guns and 5,000 small arms, "in exchange for which it was glad to receive rations, being almost at starvation point."[18]

White was one of the 6,340 soldiers who had withstood the two assaults and constant siege and gone hungry. A Union officer gave him a coat and the paroled soldier, stricken with malaria, walked to Thibodaux, Louisiana, too exhausted to care much for life.[19]

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[16](1914) 39 A. B. A. Rep. 114.

[17]Fiske, The Mississippi Valley in the Civil War (1900) 247.

[18]7 Cambridge Modern History (1904) 506.

[18]7Cambridge Modern History (1904) 506.

[19]N. Y. *Times*, May 20, 1921.

In the fall of 1865 White entered the office of Edward Bermudez, a noted civilian,[20] who was to become Chief Justice of the Supreme Court of Louisiana under the Constitution of 1880, but only after his pupil had first reached that tribunal. He also enrolled in the School of Law of the University of Louisiana, which is now Tulane University.[21] Carleton Hunt was dean of the school, Thomas J. Semmes was another teacher, and Christian Roselius had enhanced its fame a decade before. The Louisiana bar has always been a remarkably able bar and in 1868, when White was admitted to its membership, it lacked only the figure of Judah P. Benjamin then at the London bar.

In 1874, two years before the Tilden-Hayes Electoral Contest, White was elected to the state senate and was seated as a result of the compromise suggested by Senator George F. Hoar of Massachusetts, who visited Louisiana as a member of a senate committee. President Hayes withdrew the federal troops which had insured the electoral vote of the state for him and thereupon the *de facto* governor, S. B. Packard, withdrew in favor of William T. Nichols who had carried the state as the Democratic nominee. This brought to a happy ending the distress of Louisiana which had begun when General Benjamin F. Butler entered New Orleans after its reduction by Farragut, and which reached its high point when Senator William P. Kellogg controlled the forces of Re-construction.[22]

Governor Nichols had been a friend of Governor White and in 1879 he appointed Edward Douglas White to the Supreme Court of Louisiana at the early age of 34. At this age it is difficult to predict much of a young lawyer, but it is not hard to determine the extent of his industry, and White was regarded as a diligent lawyer. While the Louisiana Reports for the period of 1879–81[23] speak well of the industry and acumen of the tribunal, the terms of the incumbents ceased by the provisions of the Constitution of 1880 and White formed a partnership with William B. Saunders, one of his associates, and Charles Parlange, and the firm repaired to New Orleans where the prestige and skill of its membership secured its practice. The nature of the litigation in which White participated will not be analyzed here. As Benjamin Harris Brewster of Pennsylvania advised: "The most important part of a man's professional life is made up of a multitude of almost insignificant and obscure points of duty that he dare not omit; and in the faithful per-

[20]Dart, *The Sources of the Civil Code of Louisiana, A History* (1911) 13 La. B. A. Rep. 21.

[21]Quintero, *The Law School of the Tulane University of Louisiana* (1890) 2 Green Bag 116.

[22]Wheeler, Sixty Years of American Life (1917) 115.

[23]La. Rep. Ann. 1879, 1880 and 1881.

formance of which alone he will merit and secure the fame of a good lawyer."[24]

White never felt that he should be so interested in his profession that the activities of spoilsmen of varying kinds should receive an implied license from him. The Louisiana Lottery Company had reason to remember him for he always opposed its activities and the extension of its charter even when the state was offered $1,250,000 annually by it. He felt that the Lottery took more from the public than it gave. With Edgar H. Farrar he was its leading opponent. When the charter was not renewed in 1891 the company repaired to Guatemala and only the exclusion of the mails brought its final collapse.

In the Democratic caucus held at Baton Rouge in 1890, Senator James B. Eustis of Louisiana started with many pledged delegates, but his opponents were Benjamin F. Jones and Edward Douglass White. After many ballots White was nominated and readily defeated former Governor Henry C. Warmoth when the legislature met. Since then the nomination of a candidate by the majority party inevitably is equivalent to election in Louisiana. White served in the Senate from March 4, 1891, until March 12, 1894, when he resigned having been nominated to the Supreme Court by President Cleveland and confirmed by the Senate on the latter date. White's senatorial career, while short, was such that colleagues and the country readily gave him rank far above the usual senatorial personnel, which then, was far above the average. He advocated and voted for a high duty on sugar and believed in a protective tariff. As a gold Democrat he opposed the further purchasing of silver.

The circumstances under which White was appointed to the Supreme Court and confirmed on March 12, 1894, by the Senate are indeed unique. Years later, President Cleveland, who was then living in retirement in Princeton, related to Professor Bliss Perry how he came to appoint White. It "had the simplicity of a Sunday School story." The President and a group of senators which included Senator White, were guests of Senator Thomas F. Bayard of Delaware at his home in Wilmington. "Mr. Cleveland overheard Senator White asking Mr. Bayard if there was a Catholic church in the neighborhood, as in that case he wished to attend early mass on Sunday morning. 'I made up my mind,' said Mr. Cleveland to me, 'that there was a man who was going to do what he thought was right; and when a vacancy came, I put him on the Supreme Court.' "[25] Whether this was the motive or not,[26] the

[24]Cassidy, *Elder Brewster of Pennsylvania* (1937) 41 DICK. L. REV. 12.
[25]PERRY, AND GLADLY TEACH (1935) 146–147.
[26]MCELROY, GROVER CLEVELAND 134–135: "Indeed it is said that when he

history of the appointment made it a *cause celebre*. Its genesis was in the Democratic Convention of 1892 when Senator David B. Hill of New York became a candidate for the Presidential nomination and sought to defeat Cleveland for that prize. When Cleveland became President a second time in 1893 none of the appointments he made from New York originated with Senator Hill.

When Justice Samuel Blatchford died on July 7, 1893, President Cleveland nominated William B. Hornblower of New York to the vacancy but the Senate rejected the nomination January 15, 1894, by a vote of 24 to 30. The New York *Herald* reported the next morning that "David Bennett Hill walked out of the secret session of the Senate with a broad smile on his face." The New York *Daily Tribune* reported: "The defeat of Mr. Hornblower is, of course, a signal personal triumph for Mr. Hill . . . It is not likely to be the last set-back which Mr. Hill will administer to his successful rival." Senatorial courtesy is a policy often followed and means that if the President sends to the Senate a nomination which is distasteful to either senator of the nominee's state, other senators will join in opposition because the same practice may be resorted to in other states. It is a measure of self-protection, since the Senate under the Constitution shares in the appointive power. Senator Hill said that since President Cleveland had not previously consulted him about the Hornblower nomination, "the action of the president was the first step in the direction of a complete overthrow—unless the executive be checked—of the senatorial prerogative."[27]

On January 22, 1894, President Cleveland sent to the Senate the nomination of Wheeler H. Peckham of New York, who was also *non grata* to Senator Hill. The Senate also rejected this nomination, the vote on February 16, 1894, being 32 to 41. Peckham had inflamed the Senate by criticising its action in the Hornblower nomination. Senator Henry Cabot Lodge opposed the nomination, declaring "I do not think it wise to put on the Supreme Bench men over sixty years of age, and the soundness of this policy has been recognized by the judicial pension law and by the practice of the Senate. In addition, I was disgusted by the efforts of railroad corporations, through letters and telegrams, to secure votes for Mr. Peckham. Some of these corporations have suits pending."[28]

On February 19, 1894, three days after the rejection of the Peckham nomination, the President submitted the nomination of

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received a request to call at the White House he remarked to a friend that this would probably be his last call upon President Cleveland . . . . To his astonishment, instead of reproaches for his anti-administration activities, he was offered the vacant seat on the Supreme Bench and at once accepted."

[27]N. Y. *Daily Tribune*, Jan. 16, 1894.

[28]*Id.*, Jan. 17, 1894.

Edward Douglass White and the Senate confirmed the nomination of its own member on the same day.[29] Senator Hill thought favorably of the nomination, which explains a unanimous vote, but he "regretted that among the many excellent men on the bench in New York, and the large number of great lawyers in that state, he [the President] could not select his candidate there." White had not known that he was under consideration by the President until the night before the nomination was submitted, and he had agreed to it only the morning it was transmitted to the Senate. The country at large was pleased with the selection, for White had had judicial experience and wide success at the bar, and was, in addition, only forty-nine years old. He resembled President Cleveland in many ways and this is the real reason he was appointed. There were some adverse reactions. Christopher C. Baldwin, a New York broker, said to a *Tribune* reporter on February 20: "His attitude on the silver question increased his popularity in Wall street." One paper charged him with scheming to defeat the administration's tariff bill, and referred to a story wherein Senator White "intimated he would be delighted to throw bodily out of the Senate one of the obdurate silver men" who had declined to vote to make a quorum.[30]

II.

Edward Douglass White served from 1894 to 1921 as a member of the Supreme Court of the United States.[31] From 1910 until his death in 1921 he was the Chief Justice of the United States. To describe the work of that tribunal during twenty-seven years one would be obliged to write a treatise on constitutional law. The Court is not only a judicial body; it has been and will be, of necessity, a legislative body.[32] While it will frequently announce that it has no concern with the wisdom of legislation, in practice it will frequently act upon a contrary assumption. The opinions of the majority of the Court are the opinions of the Court itself, and it is upon this background that the utterances of Edward Douglass White must be considered, save where he has not been in agreement with the majority of the Court and has dissented. Nothing is more wearying than a practice of uncritical eulogy at bar association meetings when decisions are enumerated cumulatively.

The judicial services of White will be considered in five categories, not because other divisions may not be made, but only for the reason that his most significant points of view may be covered

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[29]The nomination was not referred to the Committee on the Judiciary.

[30]N. Y. *Daily Tribune*, Jan. 20, 1894.

[31]See Davis, *Edward Douglass White* (1921) 7 A. B. A. J. 377; Garwood, *Chief Justice Edward Douglass White* (1923) 24 La. B. A. Proc. 151.

[32]Cardozo, The Nature of the Judicial Process (1921) 98.

within that range. He also acted as an arbitrator in the Costa Rica-Panama boundary dispute, by agreement of the parties. This arbitration case will be considered separately since his award in that case was apart from his duties as a Justice of the Supreme Court. The divisions, then, are: 1. Problems of Taxation; 2. The *Insular Cases;* 3. Interstate Commerce; 4. The "Due Process" clause; and 5. The Reserved Powers of the States.

1. *Problems of Taxation.* The case of *Pollock v. Farmers' Loan and Trust Company,*[33] although the Sixteenth Amendment to the Constitution negatived the effect of its decision, holds three points of interest. In the first place it sustained the privilege of a citizen of one state to restrain a corporation in another state from paying a tax on the income from land on the ground that such a payment would be unconstitutional. The usual practice had been to pay the tax under protest and to bring suit for its recovery in general assumpsit. The holding of the court was that a tax on the income from land was a direct tax which, not being apportioned, was void. This doctrine made the decision a leading one until Congress was granted the power to tax regardless of apportionment. The writings of the fathers of the Constitution and of text writers generally were explored and both the majority and minority of the Court found what they were looking for in the same sources. The early case of *Hylton v. United States*[34] became the focal point. It had decided that a tax on carriages is not a direct tax, and, therefore, not subject to apportionment. Chase, J., remarked: "I am inclined to think, ... that the direct taxes contemplated by the constitution, are only two; to-wit, a capitation or poll tax, and a tax on land."[35] Patterson, J., who had been a member of the Constitutional Convention of 1787, said: "I never entertained a doubt, that the principal, I will not say the only objects, that the framers of the constitution contemplated, as falling within the rule of apportionment, were a capitation tax and a tax on land."[36] White, in dissenting in the *Pollock* case, said: " . . . I consider that the result of the opinion of the court just announced is to overthrow a long and consistent line of decisions, and to deny to the legislative department of the government the possession of a power conceded to it by universal consensus for one hundred years, and which has been recognized by repeated adjudications of this court."[37]

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[33]157 U. S. 429, 39 L. ed. 759 (1895), *rehearing,* 158 U. S. 601, 39 L. ed. 1108 (1895).

[34]3 U. S. 171, 1 L. ed. 556 (1796).

[35]*Id.* at 175, 1 L. ed. at 558.

[36]*Id.* at 177, 1 L. ed. at 559.

[37]157 U. S. 429, 608, 39 L. ed. 759, 829 (1895).

In dissenting, White was doing three things: (1) He was upholding the Revenue Act of August 15, 1894, passed while he was a member of the Senate and when he would not have voted for a measure of questionable constitutionality; (2) He felt bound by precedent, as indeed a court should, in matters of property and taxation; and (3) He manifested his willingness that Congress should possess such wide power and did not view the Act as Field, J., did, in the majority opinion, as a "present assault upon capital."

When the *Pollock* case was re-argued, the Court held that a tax on the income of personal property was also a direct tax. After White became Chief Justice, and the Sixteenth Amendment had been added to the Constitution, he had the satisfaction of writing the opinion in *Brushaber v. Union Pacific Railroad Company*[38] in which the Tariff Act of 1913 was under attack. "There is no escape," he said, "from the conclusion that the Amendment was drawn for the purpose of doing away for the future with the principle upon which the *Pollock* case was decided."[39]

One other tax case of prime importance was *Knowlton v. Moore*[40] in which White rendered his longest opinion and one of his clearest. It is worthy of note not merely for what it decided, but because of the rich historical treatment of the subject of "uniformity." "By the result then of an analysis of the history of the adoption of the Constitution it becomes plain that the words 'uniform throughout the United States' do not signify an intrinsic but simply a geographical uniformity."[41] The paragraph with which the opinion ends is typical of White's mental momentum: "The grave consequences which it is asserted must arise in the future if the right to levy a progressive tax be recognized, involves in its ultimate aspect the mere assertion that free and representative government is a failure, and that the grossest abuses of power are foreshadowed unless the courts usurp a purely legislative function. If a case should ever arise, where an arbitrary and confiscatory exaction is imposed bearing the guise of a progressive or any other form of tax, it will be time to consider whether the judicial power can afford a remedy by applying inherent and fundamental principles for the protection of the individual, even though there be no express authority in the Constitution to do so. That the law which we have construed [Act of June 13, 1898, taxing legacies] affords no ground for the contention that the tax imposed is arbitrary and confiscatory, is obvious."[42]

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[38]240 U. S. 1, 60 L. ed. 493 (1915).
[39]*Id.* at 18, 60 L. ed. at 501.
[40]178 U. S. 41, 44 L. ed. 969 (1899).
[41]*Id.* at 106, 44 L. ed. at 995.
[42]*Id.* at 109, 44 L. ed. at 996.

2. *The Insular Cases.* A cargo of oranges entered New York from Puerto Rico and they were taxed under the Act of April 12, 1900. The consignee sued to recover the tax and his right to recover was denied in the district court and affirmed in the Supreme Court when it was brought there by a writ of error. This was the case of *Downes v. Bidwell.*[43] While White concurred in the result reached in the majority opinion of Brown, J., he dissented from its reasoning and was joined by Shiras and McKenna, JJ. The Chief Justice dissented from the result and was joined by Harlan, Brewer and Peckham, JJ. Mr. Dooley had followed the case and recorded:[44] "An' there ye have th' decision, Hinnissy, that's shaken th' intellicts iv th' nation to their very foundations, or will if they thry to read it. 'T is all r-right. Look it over some time . . . Some say it laves th' flag up in th' air an' some say that's where it laves th' constitution. Annyhow, something's in th' air. But there's wan thing I'm sure about.' 'What's that?' asked Mr. Hennessy. 'That is,' said Mr. Dooley, 'no matther whether th' constitution follows th' flag or not, th' supreme court follows th' illiction returns.' "

The suggestion of White that the Constitution did not, within the meaning of the revenue laws, apply to territory acquired by treaty unless Congress had expressly or impliedly "incorporated" the territory, proved to be the key by means of which this vexing problem of domestic law was solved. As he said: "If the treaty-making power can absolutely, without the consent of Congress, incorporate territory, and if that power may not insert conditions against incorporation, it must follow that the treaty-making power is endowed by the Constitution with the most unlimited right, susceptible of destroying every other provision of the Constitution; that is, it may wreck our institutions. If the proposition be true, then millions of inhabitants of alien territory, if acquired by treaty, can, without the desire or consent of the people of the United States speaking through Congress, be immediately and irrevocably incorporated into the United States, and the whole structure of the government be overthrown."[45]

The final chapter in the Insular drama was written in *Rassmussen v. United States.*[46] White wrote the opinion, although Harlan and Brown, JJ., wrote separate concurring opinions. The plaintiff in error had been indicted under Section 127 of the Alaska Code for keeping a disorderly house. The Code provided for a jury of six in misdemeanor trials and the plaintiff had unsuccessfully insisted upon a jury of twelve in the court below. "We are

[43]182 U. S. 244, 45 L. ed. 1088 (1900).
[44]DUNNE, OPINIONS OF MR. DOOLEY (1901) 8.
[45]182 U. S. 244, 312–313, 45 L. ed. 1088, 1116 (1900).
[46]197 U. S. 516, 49 L. ed. 862 (1905). See Langdell, *The Status of Our New Territories* (1899) 12 HARV. L. REV. 48.

brought," said White, "to determine whether Alaska has been incorporated into the United States as a part thereof, or is simply held, as the Philippine Islands are held, under the sovereignty of the United States as a possession or dependency."[47] Upon reviewing the cases and the view-points which he had molded, White concluded his opinion in these words: "As it conclusively results from the foregoing considerations that the Sixth Amendment to the Constitution was applicable to Alaska, and as of course being applicable it was controlling upon Congress in legislating for Alaska, it follows that the provision . . . depriving persons accused of a misdemeanor in Alaska of a right to trial by a common law jury was repugnant to the Constitution and void."[48]

3. *Interstate Commerce.* Just as White's point of view in the *Insular Cases* came to be adopted by the Supreme Court, so also his views on the Sherman Act eventually prevailed. He began to enunciate his "rule of reason" in a dissenting opinion in the case of *United States v. Trans-Missouri Freight Association*,[49] when his views met the approval of Field, Gray and Shiras, JJ. The Freight Association was formed by a group of railroads which agreed to charge certain rates because the competition among them was great. White said: "To hold then the contract under consideration to be invalid when it simply provides for uniform classification, and seeks to prevent secret or sudden changes in the published rates, would be to avoid a contract covered by the law and embodied in its policy . . . The great complexity of the subject . . . present[s] difficulties enough without . . . its being advisable to add to them by holding that a contract which is supported by the text of the law is invalid, because, although it is reasonable and just, it must be considered as in restraint of trade."[50]

The Northern Securities Company became the custodian of more than nine-tenths of the stock of the Northern Pacific and more than three-fourths of the stock of the Great Northern. Mr. Justice Harlan, in affirming the decree of dissolution, held that "No scheme or device could more certainly come within the words of the act—'combination in the form of a trust or otherwise,' or could more effectively and certainly suppress competition between the constituent companies."[51] White, in dissenting, gave a strict construction to the Sherman Act, stating that "when properly in-

[47]197 U. S. 516, 521, 49 L. ed. 862, 863 (1905).

[48]*Id.* at 528, 49 L. ed. at 867.

[49]166 U. S. 290, 41 L. ed. 1007 (1896).

[50]*Id.* at 371, 41 L. ed. at 1038. See WALKER, HISTORY OF THE SHERMAN LAW (1910); WASHBURN, THE HISTORY OF A STATUTE (1927); and Guthrie, *Constitutionality of the Sherman Anti-Trust Act of 1890* (1898) 11 HARV. L. REV. 80; HUGHES, THE SUPREME COURT OF THE UNITED STATES (1928).

[51]Northern Securities Co. v. United States, 193 U. S. 197, 327, 48 L. ed. 679 (1904).

terpreted, [it] does not embrace the acquisition and ownership of such stock . . ."[52] Justice Holmes also took this point of view.

The *Trans-Missouri Freight Association* case was made use of by White in writing the opinion for a unanimous bench in *Standard Oil Company v. United States*,[53] but Justice Harlan viewed the rule of reason therein announced to be judicial legislation, although he agreed with the result reached. The Court agreed with the contention of the Attorney-General, Philander C. Knox, that "the defendant companies [there were thirty-three] obtained rebates and discriminatory rates in the transportation of their product as against their competitors, and engaged in unfair and oppressive methods of competition thereby destroying the smaller manufacturers and dealers . . ."[54] In other words, the combination was an unreasonable restraint of trade. The case of *United States v. American Tobacco Company*,[55] decided thereafter, turned on the same points of law.

The case of *Wilson v. New*[56] is a case of great importance and is referred to with increasing frequency. It was decided March 19, 1917, less than a month from America's declaration of war, and the opinion of the Chief Justice met with wide popular acceptance, although Day, Pitney, Van Devanter and McReynolds, JJ., dissented. The Act of September 3, 5, 1916, established an eight hour day for employees of carriers engaged in interstate commerce and also a minimum scale of wages. White expressed the problem involved with rare succinctness: "Or, in other words, did it [the Congress] have the power in order to prevent the interruption of interstate commerce to exert its will to supply the absence of a wage scale resulting from the disagreement as to wages between the employers and employees and to make its will on that subject controlling for the limited period provided for?"[57] The opinion justified the decision of the Court in these words:[58] ". . . whatever would be the right of an employee engaged in a private business to demand such wages as he desires, to leave the employment if he does not get them and by concert of action to agree with others to leave upon the same condition, such rights are necessarily subject to limitation when employment is accepted in a business charged with a public interest and as to which the power to regulate commerce possessed by Congress applied and the resulting right to fix in case of disagreement and dispute a standard of wages as we

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[52]193 U. S. at 400.
[53]221 U. S. 1, 55 L. ed. 619 (1910).
[54]*Id.* at 29, 55 L. ed. at 632.
[55]221 U. S. 142, 55 L. ed. 663 (1910).
[56]243 U. S. 332, 61 L. ed. 755 (1916).
[57]*Id.* at 346, 61 L. ed. at 773.
[58]*Id.* at 352, 61 L. ed. at 775.

have seen necessarily obtained." Justice Pitney said that the decision "deprives the carriers of their right to agree with their employees as to the terms of employment. Without amplifying the point, I need only refer again to *Adair v. United States*[59] . . . . ."[60]

4. *The "Due Process" Clause.* Eight chapters of Professor Dodd's *Cases on Constitutional Law* do not exhaust this subject, and cases were less frequent during White's tenure, but one should note his dissent embodied in the minority opinion of Justice Harlan in *Lochner v. New York.*[61] The New York statute had forbidden any employee in a bakery to be permitted to be employed more than sixty hours in any one week. Justice Peckham, in striking down the statute, said:[62] "The question whether this act is valid as a labor law, pure and simple, may be dismissed in a few words. There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker . . . We think the limit of the police power has been reached and passed in this case." The views of Justice Harlan were the views of White, Day and Holmes, JJ., with Justice Holmes dissenting separately. "We judicially know that the question of the number of hours during which a workman should continuously labor has been, for a long period, and is yet, a subject of serious consideration among civilized peoples, and by those having special knowledge of the laws of health. Suppose the statute prohibited labor in bakery and confectionery establishments in excess of eighteen hours each day. No one I take it, could dispute the power of the state to enact such a statute."[63] In his concurring dissent, Justice Holmes used the memorable sentence: "The fourteenth amendment does not enact Mr. Herbert Spencer's Social Statics."[64] *Adkins v. Children's Hospital*[65] was decided after the death of White, its reversal being achieved at this term of court.

White had the traditional view of liberty of contract and we find him agreeing to the opinion of Justice Pitney for the majority of the Court in the case of *Coppage v. Kansas.*[66] The case is distinguishable from the *Lochner* case, yet it reversed a conviction of a Kansas statute which made it illegal for employers to exact from employees a promise not to join or retain membership in

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[59]208 U. S. 161, 174, 178, 52 L. ed. 436, 442, 444 (1907).
[60]243 U. S. 332, 387, 61 L. ed. 755, 790 (1916).
[61]198 U. S. 45, 49 L. ed. 937 (1905).
[62]*Id.* at 57, 49 L. ed. at 941.
[63]*Id.* at 71, 49 L. ed. at 948.
[64]*Id.* at 75, 49 L. ed. at 949.
[65]261 U. S. 525, 67 L. ed. 785 (1923).
[66]236 U. S. 1, 59 L. ed. 441 (1915).

a labor organization as a condition of securing or retaining employment.

One of the last cases heard by White was *Block v. Hirsh*,[67] which upheld the District of Columbia Rent Law, a two year emergency law which allowed tenants "to continue notwithstanding the expiration of his term." White joined in the vigorous and clamorous dissent of Justice McKenna.

5. *The Reserved Powers of the State.* Four cases will give White's point of view. *Pacific States Telephone and Telegraph Company v. Oregon*[68] upheld a tax on the corporation enacted by the process of an initiative and referendum provided for in an amendment in 1904 to the Oregon Constitution. "It is the government," said White, "the political entity, which (reducing the case to its essence) is called to the bar of this court, not for the purpose of testing judicially some exercise of power, assailed on the ground that its exertion has injuriously affected the rights of an individual because of repugnance to some constitutional limitation, but to demand of the state that it establish its right to exist as a state, republican in form."[69] It followed, he said, "that the case presented is not within our jurisdiction."

The twin cases of *Guinn v. United States*[70] and *Myers v. Anderson*[71] declared a constitutional provision of Oklahoma in the former, and a Maryland statute in the latter, void in establishing a "grandfather's clause" as a condition upon which state suffrage should be exercised. The decisions struck at the discrimination forbidden by the Fifteenth Amendment and recognized that the Amendment did not confer the right to vote.

The protracted litigation between the states of Virginia and West Virginia came frequently before the Supreme Court in the exercise of its original jurisdiction. The basis of the suits was the refusal of West Virginia to pay its share of the state indebtedness of Virginia at the time that it was part of that state. The Chief Justice held that with the conferring of jurisdiction there was also impliedly granted the power to enforce its judgment. When, after the ascertainment of West Virginia's share of the indebtedness, the state of Virginia applied for a writ of execution against the state of West Virginia, the Court denied the motion pending the meeting of the West Virginia legislature.[72] Reluctantly, West Virginia satisfied the judgment.

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[67]256 U. S. 135, 65 L. ed. 865 (1921).
[68]223 U. S. 118, 56 L. ed. 377 (1912).
[69]*Id.* at 150–151, 56 L. ed. at 386.
[70]238 U. S. 347, 59 L. ed. 1340 (1914).
[71]238 U. S. 368, 59 L. ed. 1349 (1914).
[72]Virginia v. West Virginia, 241 U. S. 531, 60 L. ed. 1147 (1915).

Finally, in *Newberry v. United States*[73] the Chief Justice supported the validity of the Corrupt Practices Act of June 25, 1910, in its application to the Michigan state primary at which Newberry was a candidate for senatorial nomination. The conviction was reversed because of an improper instruction to the jury. However, the majority of the Court decided:[74] "We cannot conclude that authority to control party primaries or conventions . . . was bestowed on Congress." The view of the Chief Justice was otherwise:[75] "In view, then, of the plain text of the Constitution, of the power exerted under it from the beginning, of the action of Congress in its legislation, and of the amendment to the Constitution, as well as of the legislative action of substantially the larger portion of the states, I can see no reason for now denying the power of Congress to regulate a subject which from its very nature inheres in and is concerned with the election of Senators of the United States, as provided by the Constitution."

An extra-judicial role assumed by Chief Justice White was that of arbitrator in the boundary dispute between Costa Rica and Panama at the invitation of both states. His opinion was rendered on September 12, 1914,[76] and it embodied a decree fixing the boundary line. On the ground that the Chief Justice had exceeded the powers conferred upon him by the Porras-Anderson Treaty, Panama took the position that the award was "null in the light of international law." It is interesting to observe that the Chief Justice did not thereafter accept any other role as an arbitrator, nor has any justice of the Supreme Court since then.[77] The boundary line had not been ascertained to the satisfaction of either party in 1934 and the matter is now in abeyance, neither state exercising jurisdiction within the disputed area.

Upon White's death in 1921, President Harding appointed William Howard Taft Chief Justice of the United States and thus it came to pass that Chief Justice White was succeeded by the President who had appointed him Chief Justice in 1910.[78] Friends of Chief Justice White knew that this was his desire. So ended the career of a jurist of "noble unconsciousness."

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[73]256 U. S. 232, 65 L. ed. 913 (1920).

[74]*Id.* at 258, 65 L. ed. at 921.

[75]*Id.* at 269, 65 L. ed. at 926.

[76]FOREIGN RELATIONS OF THE UNITED STATES (1914) 1000 *et seq.*

[77]Mr. Justice Cardozo declined to serve as a judge of the Permanent Court of Arbitration.

[78]White was the only associate justice since Cushing to become Chief Justice. President Taft differed in party affiliation, background and religion from his nominee. It has been said that all his colleagues urged White's appointment.

THE LAWYER'S TEST OATH DURING RECONSTRUCTION

*William A. Russ, Jr.**

One of the perennial questions before the public is that of the best method of securing a higher caliber of men in the legal profession; the complaint is heard frequently that pettifogging lawyers make a mockery out of justice, what with their endless quibbling, their willingness to defend gangsters, and their predilections toward delaying, rather than expediting justice. This article is dedicated to the purpose of giving the history of a method which was once used to raise (in the eyes of the dominant party) the standards of the legal profession. The moral of the story is that, whether it is possible to better the general standing of lawyers as a whole or not, the means about to be discussed is a horrible example of one way which will *not* work. This means is the method of rooting out an undesirable type of attorney by requiring an oath which only the desirable type can take.

This experiment goes back to the dark days of the Civil War when the Union Government was feverishly trying to keep its head above water—the currents of which, in the form of widespread disloyalty at the North, defeat of the Union armies on the battlefield, and general despair, were threatening to engulf the nation. On July 2, 1862, the Congress enacted the famous iron-clad oath[1] in order to cull out disloyalty in the midst of government officials and employees. This purpose was commendable. It applied to jurymen,[2] judges, and all officials of the United States courts, as well as to officials of the legislative and executive departments. Later the radicals, in the Wade-Davis bill, wished it to be the basis upon which loyal governments should be constructed in the seceded *states,* as well. But as time went on, it became clear to Unionists that even if every judge, every juryman, every marshal, were loyal (that is, able to subscribe to the test oath), there was still a danger

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[1]It read that every person elected or appointed to federal office, except the President, must swear: (1) That he had never voluntarily borne arms against the United States since becoming a citizen; (2) That he had never given aid or comfort to its enemies; (3) That he had never sought office under any pretended government inimical to the United States; (4) That he would support the Constitution against any and all enemies. Appendix to CONG. GLOBE, 37th Cong., 2d Sess. (1862) 385.

[2]Strictly speaking, jurymen were subjected to a different oath—perhaps more severe than even the iron-clad, although the wording was similar. The bill to require an additional oath of grand and petit juries in United States courts became a law a few days before the iron-clad was enacted. For the history of this oath for jurors, see CONG. GLOBE, 37th Cong., 2d Sess. (1862) 1772, 2394, 2479, 2507–2508, 2539, 2618–2620, 2714. The law can be found in the Appendix to *id.* at 363.

that Secessionist, disloyal or Copperhead attorneys could preach pernicious doctrine in the courts. The oath, as enacted, could not be required of lawyers, since, strictly speaking, they were not United States officials; rather were they professional men who, after being admitted to the bar, were officers of the court before which they practiced. Something must be done to reach them.

Senator Charles Sumner, on January 22, 1864, made one of the first efforts to deal with the problem, when he offered a bill, supplementing the law of July 2, 1862, which would require the iron-clad from all lawyers who practiced before any United States court.[3] Although Lyman Trumbull, several months later, reported the bill out of the Judiciary Committee adversely,[4] the law which finally passed was almost the same as Sumner's earlier one.

In the next session, Sumner was more successful. Congressman George Julian, of Indiana, offered a lawyers' test-oath bill[5] in the House on December 6, 1864, but later withdrew it in favor of one which originated in the other chamber. The latter had passed the Senate on December 22, 1864, with practically no opposition. Reverdy Johnson, a conservative, of Maryland, while voting for it, questioned the wisdom of picking out professions in such a manner, and predicted that the next Congress would be asking that every man—doctor, clergyman, merchant—take an oath of loyalty in order to practice his profession.[6] It passed the House with practically no debate on January 20,[7] becoming a law, January 24, 1865.[8]

No person after that date could be admitted to the bar of the Supreme Court, or after March 4, 1866, to the bar of any circuit court, district court, or court of claims, as attorney or counsel unless he had taken the oath of July 2, 1862, and proof of the fact was filed among the court records. This meant that Congress was closing to those who had aided the Confederacy the doors even of offices which were not strictly appointive or elective, and that the drag-net to keep all persons of doubtful reputation out of the judicial system was evidence that Congress was risking nothing to chance. Whether Sumner and George S. Boutwell, who pushed the bill through their respective houses, were afraid of the patriotism of the judiciary is questionable, but it is evident that they did not intend giving any opportunity to able Copperhead and disloyal lawyers to preach disunion and rebellion to northern judges and

[3] CONG. GLOBE, 38th Cong., 1st Sess. (1864) 319.
[4] *Id.* at 3339.
[5] *Id.* at 4.
[6] *Id.* at 109–110.
[7] *Id.* at 350.
[8] Appendix to *id.* at 115.

juries. Undoubtedly they perceived that the courts were a delicate, but important piece of machinery in winning the war.[9] At all events, an oath seems to have been required of all who wished to practice law in the areas occupied by Union armies.[10]

The national government was not alone in its policy of disfranchising lawyers. In fact the problem had been faced in the border states much earlier, when military commanders used their best efforts to keep disloyal persons from practicing in the courts of the states and of the United States. All the border states were so divided in sentiment that measures had to be taken to purify the legal profession—and, as well, other professions such as those of the ministry and teaching. Missouri is a good example. In 1862, General W. H. Halleck gave the legal profession of that state a purgative in the form of a military order which required all licensed attorneys, counsellors and proctors to take the oath of allegiance or to cease practicing.[11] Soon the state government aided the military in ridding itself of Secessionist influence, when the convention, which was the *de facto* government, ordained that all jurymen and attorneys (as well as teachers, clergymen, bank officials, and other professional groups) must take a strict oath of loyalty.[12] Later in the war, the radical constitutional convention which met on January 6, 1865, to abolish slavery, imposed one of the most harmful disfranchising systems extant during the period under survey. All jurymen, lawyers, bishops, priests, deacons, ministers, elders and teachers were to subscribe to a rigid oath before they were allowed to pursue their calling.[13] It is hardly necessary to relate that this requirement fell heavily upon the people of Missouri and caused untold economic suffering. The radical government of Maryland, in January, 1865, likewise passed a law which required an oath from attorneys.[14] So also, Kentucky.[15] West Virginia delayed until February 14, 1866, before it disfranchised attorneys; after that attorneys were compelled to take an

[9]Whether they perceived this early how the courts might become just as delicate a cog in the reconstruction machinery is debatable.

[10]Sherman, on his march to the sea, was faced with the problem as to whether southern lawyers might practice. At Savannah, one Solomon Cohen asked General F. P. Blair if he could follow his profession. Blair referred the matter to Sherman, who answered: "No one can practise law as an attorney in the United States without acknowledging the supremacy of our Government." 2 SHERMAN, MEMOIRS (1875) 266. This antedates the passage of the law.

[11]ANNUAL CYCLOPAEDIA (1862) 590.

[12]H. MISC. DOC., 38th Cong., 1st Sess., Doc. No. 13 (1863) 57–59.

[13]ANNUAL CYCLOPAEDIA (1865) 588.

[14]See the author's *Disfranchisement in Maryland (1861-67)* (1933) 28 MD. HIST. MAG. 322.

[15]COULTER, THE CIVIL WAR AND READJUSTMENT IN KENTUCKY (1890) 290.

oath that they had not aided the Confederates since the formation of the state.[16]

In short, as the war ended, the legal profession was under such an array of disabilities, national and state, that thousands of lawyers in the border and southern states were faced with the problem of finding other employment. Not all could follow the example of Judah P. Benjamin, the Confederate Secretary of State, who fled to England and in due course of time was complimented by the Lord Chief Baron of the Court of the Exchequer on his able argument in a cotton case.[17] Some Secessionists might admit that they deserved political disfranchisement—that is, loss of right to vote and to hold office—but it was cruel supererogation to disable them economically. Indeed, this type of punishment was so unnatural that in certain states repeal was demanded almost as soon as the oath was established. Kentucky, of couse, led. The war was barely over when it rescinded the oath just recently imposed.[18] Maryland kept its oath until March 19, 1867.[19] West Virginia, having enacted a test oath for lawyers after the war ended, retained it until February 7, 1870.[20] Missouri, in the grip of a radical minority, was also adamant. An attempt to remove lawyers, ministers and teachers from the iron-clad requirement failed in the Missouri House, on March 16, 1866, by a vote of 61 to 30.[21] The radical Fletcher won the Governorship in 1866 because so many citizens were politically disfranchised, yet in his first message he advocated the repeal of the test oath for professional people because "it has not prevented disloyal persons from pursuing the avocations of lawyers and school-teachers."[22] A bill embodying his recommendation died in the Senate.[23] Meanwhile the Missouri oath for the professions was being tested in the courts; and finally, in *Cummings v. Missouri*,[24] the United States Supreme Court declared a test oath for ministers unconstitutional. This did not directly affect attorneys, but at least the radical defenses had been breached. It remained for a case which originated outside the state to free lawyers, although able Missourians time and again challenged indictment for refusal to take the lawyers' oath.[25]

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[16]Long and Wilson, *Reconstruction in West Virginia* in HERBERT, WHY THE SOLID SOUTH 265.

[17]Charleston *Courier*, Mar. 20, 1867.

[18]Ky. Acts 1865, pp. 3, 8.

[19]Md. Laws 1867, p. 189.

[20]W. Va. Laws 1870, p. 16. West Virginia was the last state to repeal.

[21]ANNUAL CYCLOPAEDIA (1866) 524.

[22]*Id.* at 525; St. Louis *Missouri Democrat*, Jan. 5, 1867.

[23]ANNUAL CYCLOPAEDIA (1867) 521.

[24]71 U. S. 277, 18 L. ed. 356 (1867). See the author's *Anti-Catholic Agitation during Reconstruction* (1934) REC. OF AMER. CATH. HIST. SOC.

[25]CARR, MISSOURI (1892) 368; Vest, in HERBERT, WHY THE SOLID SOUTH 288.

Meanwhile, there had been considerable activity in national circles to permit southern lawyers to practice before United States courts. Shortly after the end of the war, the test oath for lawyers began to meet opposition in the form of suits to test its constitutionality. In a long opinion, Judge Trigg, of the United States Circuit Court for the Eastern District of Tennessee, declared the oath for lawyers unconstitutional because it was *ex post facto* legislation. The case was of some moment, since men like Thomas A. R. Nelson and Horace Maynard were pitted against each other as counsel.[26] A little later a similar case was instituted in New Orleans by an attorney presenting himself before the Louisiana Supreme Court but refusing to take the oath.[27] About a year later, Judge Frazier, United States judge in Florida, declared the iron-clad oath, as applied to lawyers, unconstitutional.[28] In Savannah, Judge John Erskine, of the United States District Court of Georgia, also declared the test oath for lawyers unconstitutional, in May, 1866.[29] William Law had applied for the right to practice on the basis that he had received a special pardon from the President, in accordance with the thirteenth exception of the Amnesty Proclamation of May 29, 1865. The case is noteworthy in that Law was defended by Joseph E. Brown,[30] whose argument led Erskine to make a decision similar to that later made by the Supreme Court. But out of deference for the higher court which was dealing with the same question, Erskine's[31] decision was not published until almost a year later. Meanwhile, Thaddeus Stevens had offered, on January 15, 1866, a resolution in the House to order the Judiciary Committee to inquire into the expediency of amending the act of January 24, 1865, to relieve lawyers from taking the iron-clad. The resolution passed, 82 to 77, the "nays" solidly Republican.[32]

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[26]Nashville *Despatch*, June 8, 1865.

[27]*Id.*, Aug. 26, 1865.

[28]Huntsville (Ala.) *Advocate*, May 5, 1866.

[29]The decision, *Ex Parte* Law, 35 Ga. 286 (1866), was printed in Atlanta *Daily Intelligencer*, Feb. 28, 1867, and in Savannah *Republican*, Mar. 2, 1867.

[30]Brown's argument is given in the Appendix to FIELDER, JOSEPH E. BROWN 756–772.

[31]This same Erskine, however, ran afoul of Robert Toombs, some months later, when he refused to allow Toombs to practice at the bar. In a typical Toombs' castigation, the man who might have been President of the Confederacy said: "Sir, twenty years ago, when you were drinking butter milk out of a swill-tub in the bogs, I was a practitioner before the court which you disgrace. Fifteen years ago, when I was a Senator in Congress, you were selling lager beer from behind the counter of a groggery, and at no period in ten years has any gentleman seen the time when he could afford to notice you in the streets; and yet, sir, you who are perjured in accepting the office you now hold, presume to refuse gentlemen the right to practice before you." New York *Tribune*, clipped by Charleston *Mercury*, Dec. 18, 1867. See also PHILLIPS, LIFE OF ROBERT TOOMBS (1913) 257, 269–270, 273.

[32]MCPHERSON, HAND-BOOK OF POLITICS (1868) 111.

It remained, however, for the Supreme Court, instead of Congress, to remove the lawyers' test oath from the statute books.

A. H. Garland, a well known statesman of Arkansas, ex-Confederate Congressman, and later United States Attorney-General, brought suit in the United States courts against the oath.[33] The case was argued before the United States Supreme Court in the same session of the national tribunal in which the *Cummings* case was decided. Aided by Reverdy Johnson and Matthew H. Carpenter, Garland opposed the oath not only because it was *ex post facto* and an attainder, but also because he was the recipient of a Presidential pardon. The majority decision, presenting the conclusions of Field, Wayne, Nelson, Grier, and Clifford, accepted most of the contentions of Garland, Johnson, and Carpenter, by declaring that the act of January 24, 1865, was in the nature of *ex post facto* legislation and attainder,[34] and was therefore unconstitutional. Field, who read the decision, asserted that a lawyer or an attorney was not an officer of the United States, but a member of a profession who might be admitted to practice before the bar of a court on the basis of his legal learning; moreover, Congress had no authority to prescribe an oath for any profession.[35] The minority opinion, written by Miller, for himself, Chase, Swayne, and Davis, submitted that the oath was constitutional because all governments had the right to pass laws for the preservation of good moral character and because Congress had the power to impose oaths. Miller asserted further that the oath was not an attainder, as the majority believed, because it had nothing to do with inheritance; and that it was fair to all, because every lawyer, loyal or rebel, had to subscribe in order to practice. The real animus behind the oath as required was well expressed by the minority in the following words:

> "The history of the Anglo-Saxon race shows that, for ages past, the members of the legal profession have been powerful for good or evil to the government. They are, by the nature of their duties, the molders of public sentiment on questions of government, and are every day en-

[33] *Ex parte* Garland, 71 U. S. 333, 18 L. ed. 366 (1867). The decision was published all over the country because it was considered so important. For instance, the Charleston *Mercury* had the majority opinion on Jan. 18, and the minority one on Jan. 19, 1867. The wording, however, was inaccurate.

[34] The references to attainder and *ex post facto* in the majority opinions of the Garland and Cummings cases provided conservatives with arguments for a similar attack upon the disfranchisements imposed by the reconstruction acts. *Cf.* Charleston *Courier*, Dec. 24, 1867.

[35] The majority also stressed the unconstitutionality of the oath in respect to Garland because he had been pardoned by the President; pardon, said they, removed all possibility of punishment. This seemed to say that a pardon restored the franchise, which all radicals denied.

> gaged in aiding in the construction and enforcement of the laws. From among their number are necessarily selected the judges who expound the laws and the Constitution. To suffer treasonable sentiments to spread here unchecked, is to permit the stream on which the life of the Nation depends, to be poisoned at its source . . . if all the members of the legal profession in the States lately in insurrection had possessed the qualification of a loyal and faithful allegiance to the government, we should have been spared the horrors of the Rebellion."[36]

The repercussions to these "rebel" decisions[37] were nothing less than violent; Republicans considered the decisions devastating and were certain that the Court had allied itself with the President. Radicals in Missouri, especially, were outraged because, as a special despatch to the Chicago *Tribune* said, "Rebels [were] taking Advantage of the Test Oath Decision."[38] But liked or not, the decision stood; the New York *Times* asserted: "Missouri . . . must abandon its test oath . . ."[39] Finally the State Supreme Court (on different reasoning) accepted the verdict of the national Court, but not before several Missouri judges were impeached and removed for applying the decision, especially for using juries without requiring the oath.[40] Without any ado whatever, West Virginia simply refused to abide by the decision and continued to require the oath from lawyers.[41]

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[36]*Ex parte* Garland, 71 U. S. 333, 386, 18 L. ed. 366, 372 (1867).

[37]Besides the Garland and Cummings decisions, which the radicals considered rebellious, the Court had just declared against martial law in times of peace when the courts were open, in *Ex parte* Milligan, 71 U. S. 2, 18 L. ed. 281, decided on Dec. 17, 1866. The New Orleans *Crescent*, Feb. 23, 1867, made the point that the military reconstruction bill then in the process of enactment, was a direct thrust at the Court in the Milligan case. The military law would place the entire South under military administration which would include military courts.

[38]Jan. 21, 1867.

[39]Jan. 15, 1867.

[40]St. Louis *Missouri Republican*, Feb. 21; Mar. 6, 13, 20; Apr. 1; and June 1, 1867.

[41]Judge W. L. Hindman, of the Eighth Judicial Circuit was impeached and removed for allowing a lawyer to practice law without taking the oath, even though Hindman pointed out that he was following the decision of the United States Supreme Court in the Garland case. In June, 1868, the legislature declared that it would not favorably receive any petitions against the lawyers' test oath "except such petition be accompanied by a written renunciation of former wrongs and an acknowledgement of errors—discarding and abandoning the false dogma of exclusive States rights sovereignty." ANNUAL CYCLOPAEDIA (1868) 763–764. The state of West Virginia remained in the grip of the Republican party until 1870, when the test oath for attorneys was removed from the statute books. W. Va. Laws 1870, p. 16. West Virginia had learned its lesson. Test oaths of any kind whatever did not pay. The new Constitution of 1872 declared that "No religious or political test oath shall be required as a pre-requisite or qualification to vote, serve as a juror, sue, plead, appeal,

It was in the national arena, however, that the battle raged most intensely, for the *Cummings* and *Garland* cases threw the radicals, who were in the midst of a fight-to-the-finish with the President over reconstruction, into consternation. Some considered outright repudiation of the Supreme Court's decree.[42] The wrath of the radicals could not be understood were it not comprehended that they now believed that the Supreme Court had finally taken a conservative stand behind the President and that it would, in due course of time, declare the reconstruction policy of Congress (both that enacted and about to be enacted) unconstitutional. This was well expressed by the Chicago *Tribune* as follows:

> ". . . the predictions of the Copperheads and rebels in regard to this decision, have been amply fulfilled, and . . . the loyal men of the nation must prepare themselves to face the disagreeable truth, that they cannot rely upon the Judicial department of the Government, as at present constituted, to coöperate with them in securing the fruits of their hard-earned victory over rebellion, or to uphold the principles of justice and liberty established at such sacrifices of blood and treasure. [It means that Congress cannot] exclude a red-handed traitor from practising in one of these very Courts into which it breathes the breath of life, which is dependent upon it for its jurisdiction and the very breath of its existence."[43]

The New York *Tribune* said: ". . . we have the monstrous anomaly of a Constitution which gives treason the legal power to evade the consequences of treason, and prevents Congress or the States from making loyalty a qualification of office."[44] That radical firebrand of Philadelphia and Washington, John B. Forney, said, in his Philadelphia *Press,* that the recent decision was "Dred Scott

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or pursue any profession or employment." JOURNAL OF THE CONVENTION (1872) 165, and Appendix to *id,* at 4–5.

[42]At least one judge in the national system did repudiate the decision of the Supreme Court and received the plaudits of radicals everywhere. Col. A. B. Magruder, upon applying for admission to the bar of the District of Columbia, admitted that he had been a judicial official before going into the rebellion, but justified his action by saying "that he is a native of Virginia, and owed to Virginia a paramount fealty." Savannah *Republican,* Feb. 19, 1867. Chief Justice Carter of the District Supreme Court refused to admit him because the recent decision of the national Court was erroneous. New York *Tribune,* Feb. 13, 1867, printed his decision. The Philadelphia *Press,* Feb. 13, 1867, in eulogizing the judge, said: To "have it pleaded in expiation of treason . . . in the District of Columbia, by one who, if he had succeeded, would have destroyed the Capitol which he had solemnly sworn to defend in his oath as a member of the local courts, shows at once the defiant character of the rebellion itself, and the crying necessity for precisely such a decree as that under notice."

[43]Jan. 15, 1867.

[44]Jan. 15, 1867.

Number Three";[45] and several days later he added: "If it were not rather a violent presumption, a strong argument could be made to show that a majority of the Supreme Court had entered into a regular combination with the rebel State judges and politicians."[46] The *Missouri Democrat*, referring to the decision as "Another Voice from the Tomb of Taney," asserted: "Every enactment that the people have framed to make treason odious becomes impaired in its efficiency by this decision. Every traitor, branded with infamy by an indignant people, takes refuge in the closet of the Supreme Court, and hides himself under the robes of justice."[47] Even the New York *Nation* charged that the Court had decided "on the singular ground, amongst others, that to require this oath of a man who cannot take it is to inflict a punishment without trial."[48]

Thus the radicals were violently indignant.[49] They were certain that rebel lawyers (ever known to be very able) could now preach conservative doctrine to the courts; they were mortified that treasonable persons of the legal profession were not to be punished economically; and they feared for the radical reconstruction which they were at that very moment legislating into being. But not all was lost, for they controlled Congress. Counter-measures were begun at once.

Shortly after the Court's recent "rebel" decisions, Congressman Boutwell reported, on January 22, 1867, a bill which would prevent any person guilty of treason, bribery, murder, or rebellion from acting as an attorney or counsellor in any United States court. It placed the duty on judges to inquire into the antecedents of every applicant to practice before a United States court, and required the attorney to take an oath that he was not guilty of treason. If he swore falsely he could be prosecuted for perjury.[50]

Boutwell said that the purpose of the bill was to prevent southern lawyers from exercising "an influence over the Chief Magistrates of the land deleterious to the public morals."[51] He later asserted that "it is an offense to the dignity and respectability of the

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[45]Jan. 15, 1867.

[46]Jan. 19, 1867.

[47]Jan. 16, 1867.

[48]Jan. 17, 1867.

[49]The conservatives were correspondingly jubilant. This is well indicated by the comment of the Louisville *Journal*: "The test oath is the taproot of the system. The decision cuts it up. And down goes the system. The Radical party, as is now manifest, cannot live, unless the Supreme Court as well as the President is removed; and the removal of both would infallibly kill the party. Such is the Radical dilemma. It is a beautiful strait." Clipped by the Augusta (Ga.) *Constitutionalist*, Feb. 2, 1867.

[50]McPherson, Hand-Book of Politics (1868) 184–185; Atlanta Daily *Intelligencer*, Jan. 22, 1867.

[51]Cong. Globe, 39th Cong., 2d Sess. (1867) 646.

nation that that tribunal . . . does not protect itself from the contamination of rebels and traitors."[52] The Democrats, although not granted much time to talk, pelted the bill with criticism. Chanler, of New York, emitted his objections by calling Boutwell "the devil's advocate from Massachusetts," and was called down for it.[53] Rogers, of New Jersey, said that it would keep lawyers from practicing, although they had not been convicted by a jury; that attorneys were not United States officers anyway; and that it would deprive them "of the means of earning a livelihood."[54] Hale, of New York, expressed a similar objection, namely, that it was unwise to disfranchise one from "a profession by which a man gets his living, by which he earns his bread."[55] Boyer aptly summarized the reasons why the radicals advocated the bill, as follows: "The Executive is a barrier to the designs of the majority in this House, the Supreme Court is another barrier; therefore war is made upon both the Executive and the Judiciary."[56] Dawes, of Massachusetts, found the bill to his liking, because he felt that all states required their lawyers to have a good moral character, and that that was precisely what the present measure would require in national courts.[57]

It was now the turn for Southerners and conservatives to protest. The Memphis *Avalanche* said of the Boutwell bill:

> "It is a move to bring the Supreme Court into contempt . . . There is more malignant treason, and more inveterate hatred manifested in this high-handed usurpation by Congress, against the Constitution and Government of the United States, than the thundering of rebel guns upon the flag at Fort Sumter."[58]

Of course President Johnson's organ, the Washington *National Intelligencer,* protested vehemently:

> "The gravest evil of the principle is, that it recognizes the right of a majority to annihilate opposition by declaring a forfeiture of rights by crime, the *crime* being the real or pretended notion the majority have of the behavior of the minority, and not the legal conviction of each one of them for an offense against the law. Give one set of politicians the privilege of finding their opponents guilty without a jury, trial, and verdict, and the party

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[52] CONG. GLOBE, 39th Cong., 2d Sess. (1867) 649.
[53] *Id.* at 647.
[54] *Ibid.*
[55] *Id.* at 648.
[56] *Id.* at 684.
[57] *Id.* at 648.
[58] Jan. 24, 1867.

> is yet to be that would not find the guilt—any amount of it. The idea of proscribing troublesome or influential opponents by legislative act imputing crime, though no conviction was had, nor indeed any wrong done, statutory or moral, is not at all a novelty."[59]

This kind of theorizing seemed foolish to radicals, for how was it humanly possible to convict, by individual jury trial, every one of the thousands of rebels? The conservative Boston *Post* interpreted the bill as "simply an open conflict between the authority of the Supreme Court and Congress. Mr. Boutwell's intent is to nullify that of the Judiciary." Everyone knew, it added, that the Court could set aside a law of Congress, but since when could Congress nullify the court?[60] The human side of Boutwell's bill is well expressed in a letter written by J. M. Clement, of Mocksville, North Carolina, to Edward McPherson, Clerk of the House:

> "I am, & have been a close Servant of the law—for over 19 years—eschewing politics—as a thing of evil—& caring but little for 'the brutum fulmen' of Buncombe Speeches in Congress. But this last lick of Boutwell's to deprive professional brethren (or is he a Lawyer?) of the right to live by their profession, because they lived on a different sides [*sic*] of the lines of military occupation during the late Struggle, Seems a refinement of cruelty—that by comparison extenuates the witchburning of his ancestry into Something genial [?].
>
> "If Mr. Boutwell had lived in N. C., dependent on the practice of the law for the Support of his family—corn at $40 pr bushel—Bacon at $5 pr lb—would he have acknowledged the *defacto* govt. for the time being by taking the Oath, or let his wife & children *Starve*?"[61]

Fortunately for such persons who would have been deprived of their livelihood, the Boutwell bill did not become law. It passed the House the day after it was reported, by a vote of 108 to 42, but was not acted upon in the Senate.[62] Perhaps the radicals did not intend that it should go further; what they were more interested in was cowing the Supreme Court so that the reconstruction laws would not be declared unconstitutional.[63]

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[59]Jan. 26, 1867.

[60]Jan. 28, 1867.

[61]Jan. 30, 1867, in 6 *McPherson Papers* 70066, LIB. OF CONG.

[62]MCPHERSON, HAND-BOOK OF POLITICS (1868) 184–185.

[63]The radical attack upon the Court was really a double-barrelled one. On January 21, Benjamin, of Missouri, and Williams, of Pennsylvania, offered bills requiring a full bench and a unanimous decision of the Court when it declared laws unconstitutional. CONG. GLOBE, 39th Cong., 2d Sess. (1867) 616.

With the Supreme Court scared into harmlessness, the danger of a revival of the test oath for lawyers passed. The thousands of members of the legal profession in the South could now pursue their vocation undisturbed; indeed the only important state in which they were still disabled was West Virginia, which freed them several years later. The boon presented by the court to dispossessed lawyers in the *Garland* case, was of inestimable benefit to Southerners of the legal fraternity. In the first place it made possible the financial recuperation of great numbers of former Confederates who could now leave the South and seek their fortunes in the law courts of New York and Washington. Men like Roger Pryor, who were out at the elbows, borrowed money to travel North. Pryor at least, after a terrible struggle, regained economic security by building up a lucrative practice in the very heart of the industrial North which he had hated and which for four years he had fought to defeat.[64] Secondly, it was now possible for many of these lawyers to regain their practice in the South—a fact of more than ordinary significance. For, had the Court not nullified the test oath, or had the Boutwell bill been passed, it would have been out of the question for southern attorneys to earn a livelihood at court; inasmuch as the South was at once placed under military reconstruction, the state courts in which they might have practiced were wiped out, and radical judiciaries were established by the radical constitutions. Had ex-Confederates been disqualified in national courts, they would undoubtedly have been disqualified in all or many of the new radical state courts—just as they were politically disfranchised by many of the radical state constitutions. Unhampered by any test oath, they could at least practice law and at times were able to use their legal ability in preventing negroes and carpet-baggers from completely ruining the state governments. Howell Cobb, who had a lucrative law practice before the war, was glad to write to his wife that he was willing to take any fee in order to get a case: "The 'nibbles' continue and I have no fears that you will be driven to the necessity of opening a day school."[65] Even the nibbles would have stopped had the test oath continued. Likewise, Alexander Stephens, ex-Vice President of the Confederacy, wrote his friend, J. Barrett Cohen, that he was trying to drum up a new law practice, and in the end succeeded.[66] Disfranchised from

The New Orleans *Crescent*, Jan. 23, 1867, said that this was further evidence of how the "radicals pursue their road to supreme and undivided empire, and of the audacious and contemptuous disregard they have for judicial as well as executive authority."

[64]PRYOR, REMINISCENCES OF PEACE AND WAR (1924) 42 *et seq.* For the drift of rebels to New York, see Rev. J. S. Long, in the *Episcopal Methodist*, clipped by Philadelphia *Press*, June 20, 1868.

[65]THOMPSON, RECONSTRUCTION IN GEORGIA (1915) 117–118.

[66]May 25, 1867, *Stephens Papers*, LIB. OF CONG.

office, as he was for some years, it is difficult to see how Stephens could have earned his living had he been prevented from appearing at court. Others, like Generals Wheeler and Fagan, were doing the same.[67]

In conclusion, it may be stated that the experiment of disabling unwanted lawyers and teachers was a failure—even more so than the removal of leading southern statesmen from politics. It has been seen that in the border states, where there were so many ex-Confederates, it was impossible to keep them from practicing: Governor Fletcher, of Missouri, has been quoted in support of that. Furthermore, both Kentucky and Maryland confessed that they needed the talents of all their native sons,[68] especially since the disqualification of the best of their men allowed second-raters to emerge into a pseudo-prominence. These states soon restored their rebel lawyers, just as they soon restored their statesmen. If the clause in the West Virginia Constitution of 1872, against disfranchisement of any kind whatever, means anything, it means that that state was glad, also, to be rid of its test oath. Instead of getting better lawyers, these states got ones of a lower caliber. And, while disfranchisement of attorneys in the United States courts might have been more successfully administered than in the state courts, the very fact that it existed for only two years is eloquent proof that it was not generally successful. Moreover, it should be stressed that a test oath for lawyers was un-

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[67] *Cf.* Louisville *Courier*, clipped by Charleston *Mercury*, July 30, 1867; and Houston (Tex.) *Telegraph*, clipped by *id.*, Dec. 14, 1867.

[68] The Kentucky legislature repeatedly asked amnesty for all the state's exiles. On March 9, 1868, it said that Kentucky was "entitled to the services of all her citizens; she desires the return of all her exiles to their homes, and the restoration of all lying under any disability to a perfect political and civil equality with all her other citizens." COULTER, *op. cit. supra* note 15, at 314–315. The Louisville Council voted 14 to 4 to invite John C. Breckinridge back, because Kentucky needed him. Cincinnati *Commercial*, Jan. 13, 1868. Breckinridge was in Paris and wished to return in order to practice law if he could do so without being imprisoned. See *Breckinridge Papers*, folio 1862–1868, LIB. OF CONG., for the attempts of Kentuckians to get him home. The State Auditor, D. Howard Smith, wrote him on December 11, 1868: ". . . you ought to Come *immediately* home. This is the judgement [*sic*] of nearly every friend you have in Kentucky." Even Greeley had written on April 8, 1867, to George Shea, a letter which he wished forwarded to Breckinridge, in which he said, in part: ". . . it seems to me a pity that the presence and counsel of Gen. Breckinridge are wanting. We need them, not in the South proper, but in his own Kentucky . . ."

In Maryland, an anti-registry law convention was held in January, 1866, which formed a memorial to be presented by Montgomery Blair to the state legislature. The memorial pleaded eloquently for removal of disabilities because the war was over and because Maryland needed the services of her own sons. See a pamphlet in Library of Congress, entitled *Proscription in Maryland. Speeches of the Hon. Montgomery Blair, as President of the Anti-Registry Convention, to the Convention and to the Legislature of Maryland. Delivered 24th and 25th of January, 1866.*

wise, even granting that one for voters and office-holders was necessary. Professional disqualifications not only produced economic maladjustment, but also infringed upon the right of a guild or profession to earn its daily bread. The situation was made almost intolerable in those states which disabled ministers, teachers, lawyers, and others; it was intolerable not only for those disfranchised, but for the community as a whole. The professions are an integral part of civilized society, and society without the ministration of free, unfettered professions is unthinkable. A test oath is an excellent example of one way in which the law, or any other profession, cannot be improved.

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STATE BAR SECTION

[Items for this section should be submitted to Mrs. Alice Nevels, Secretary of the Mississippi State Bar, New Capitol Building, Jackson.]

Report of Committee on Pleading, Practice and Procedure

To The Mississippi State Bar:

At the last meeting of this association the following resolution was adopted:

"That the president of the Mississippi State Bar appoint a study committee to be composed of three members of the Mississippi Supreme Court, one of whom shall be the chief justice, three circuit court judges, two chancellors, and eight members in active practice, one from each congressional district, and one from the state-at-large, who shall be the Dean of the Mississippi Law School at the University, to formulate those proposals or changes in the practice, pleading, and procedure governing the several courts of this state, without direction as to whether or not it shall follow the proposed rules of the United States Supreme Court, to be submitted to the next annual meeting of the Mississippi State Bar, with the request that that committee prepare their proposal so that it be published in the Journal immediately preceding the next annual convention, there to be considered."

Pursuant thereto a committee was appointed consisting of Justices Sydney Smith, J. G. McGowen and George H. Ethridge; Judges Arthur Busby, J. F. Allen, John M. Kuykendall, R. E. Jackson, and T. P. Guyton; Dean T. C. Kimbrough; and attorneys Frank E. Everett, J. V. Gipson, R. M. Kelly, H. F. Case, E. B. Cooper, C. L. Garnett, Ross R. Barnett, and O. L. Kimbrough. This committee after electing the undersigned as chairman and Mrs. Alice Nevels as secretary thereof, appointed a sub-committee composed of Justice George H. Ethridge, chairman; Dean T. C. Kimbrough; Judges John M. Kuykendall and R. E. Jackson; and attorneys O. L. Kimbrough, Frank E. Everett, and Ellis B. Cooper, to investigate the question submitted by the above resolution and report its conclusion to the full committee. Thereafter, the sub-committee reported several recommendations, of which the following were adopted and are submitted for your consideration:

1. That in trials in justice of the peace and other courts, from which appeals lie to the circuit court, and are tried *de novo*, where a jury trial is had the jury need not be unanimous, but two-thirds thereof may agree upon a verdict in civil cases and in misdemeanors, and this shall be treated, for all purposes, as the verdict of the jury, judgment being entered thereon in the same way, and with the same effect, as if it were unanimous. This, it is

thought, will save delay and expense. But this procedure should not be applied to courts where the jury verdict is final, and the appeal is upon the record.

2. That Section 568, Code of 1930, providing that variance shall not be material in any case where the attention of the court is not called thereto, should be repealed, as pleadings should be a part of the record, and the effect of the judgment should be *res adjudicata* only where there is evidence to sustain the action set out in the pleadings. The opposite party should be enabled to rely upon the action stated in the pleadings, and not be put to the hazard of oral proof to show what was involved in the action. He is entitled to rely upon the specific action set forth. Pleadings now can be amended when necessary to achieve the ends of justice at any time before rendition of the verdict, and this should remain the law. But a litigant should not be allowed to present one cause of action, and recover on evidence in another.

3. That Section 586, Code of 1930, be amended so as to permit the circuit judge, when after both sides have offered their instructions, he shall be of the opinion that applicable principles have not been requested, to call attention to such omissions in the absence of the jury, and suggest to counsel on both sides to draft such principles; and, upon their failing to do so, to draft them himself, and give them in charge to the jury in writing. But counsel on either side may except to the giving of such instructions and shall not be held to have waived their right to object by using them, as they shall be required to do, in other cases. The judge may modify, refuse or give such instructions prepared by counsel under his directions, and such modification shall be subject to exception, and no waiver shall be held applicable for the use of such instructions, as required. That the section be amended so as to read: "The judge in any case, civil or criminal, shall not sum up or comment on the testimony, or charge the jury on the weight of the evidence, but at the request of either party he shall instruct the jury, in writing, upon the principles of law applicable to the case. All instructions asked by either party must be in writing, and all alterations or modifications of instructions given by the court, or refused, shall be in writing, and those given must be taken out by the jury on its retirement. Whenever both sides have presented to the judge the instructions which each desires to have given in charge, and the judge shall be of the opinion that other or additional instructions should be given, he shall, in the absence of the jury, call attention of counsel on each side to such principles as he thinks should be given in charge, and request them to prepare and present such instructions in writing, and if, after such request, counsel do not present suitable instructions on such propositions, the judge shall give on his own judgment such instructions in writing to the jury for their guidance; but either side may object or except to the giving of such instructions, or any of them, and shall not by using the

instructions waive his or their objections, and such objections may be assigned for error on appeal. But the use of an instruction modified by the judge over objection, shall be held to be a waiver of the objection. All instructions shall be marked by the clerk before the jury retires, "given," "refused," or "modified," as the case may be, and being thereupon filed by the clerk become a part of the record, without a further bill of exceptions. All instructions for either side shall be read to the jury before arguments begin."

4. That Section 1272, Code of 1930, be so amended as to permit persons jointly indicted for the crimes of robbery, larceny, burglary or kidnapping to be tried jointly, in the discretion of the judge, where the evidence for the state is against all of them. That said section be amended to read: "Any of several persons jointly indicted for a felony (except burglary, kidnapping, robbery or theft) may be tried separately on making application therefor before the order for a special venire in capital cases, and before arraignment in other cases. In cases of kidnapping, burglary, theft or robbery, where more than one defendant is charged, the evidence being the same against all of them, they shall be tried jointly; but where, for good reason shown, the trial judge is of the opinion that prejudice or bias existing as to some of them may affect others in a joint trial; or where one may have a special defense which might be prejudiced by a joint trial, or in cases where the state has evidence as to one or more which is inapplicable or prejudicial to others, a severance may be allowed."

In addition to the above suggestions the committee voted to submit the following:

That all motions for security for costs shall be filed and notice given thereof to the opposite party, or his attorney, at least three days before the first day of the term of court to which the same is sought to be heard, and in default thereof, the same shall not be entertained; and the filing of such motion shall not in any case be a sufficient appearance on the part of the defendant, but he shall proceed with his pleading as if no such motion had been filed.

Respectfully submitted,

Sydney Smith, Chairman
Alice Nevels, Secretary

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The State Bar Commissioners will meet Saturday, February 26th, in Jackson to set a date for the annual meeting and to make plans for a program to be presented at that time.

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Local bar associations that have held recent meetings and elected officers for the new year are the Adams County Bar, which elected E. H. Ratcliff, president, and William Braden, Jr., secretary;

Leflore County Bar with R. V. Pollard, president, and R. J. Pettey, secretary; and the Hinds County Bar electing L. L. Posey, president, and Henry Edmonds, secretary.

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Chancellor A. B. Amis has had published a second free edition of his booklet entitled *Duties of Executors, Administrators and Guardians.* The first edition of this booklet consisted of 500 copies for the chancellor's use and 3,000 copies in folder form, which were distributed to the clerks of his district for delivery to executors, administrators and guardians in their several courts. Judge Amis also supplied every student in the University Law School with a copy of this useful booklet.

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The office of county prosecuting attorney has been reëstablished in Holmes County and Pat M. Barrett has been appointed by the Board of Supervisors to fill this position.

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O. H. Barnett, Jr., of Carthage, member of the Board of Commissioners from the eighth district, has been elected to the board of directors of the Leake County Bank. Other attorneys elevated to similar positions are Herbert Holmes of Senatobia, member of the board of directors and attorney for the Bank of Senatobia, and also attorney for the Bank of Coldwater, H. Talbot Odom, member of the board of directors of the Bank of Commerce of Greenwood; B. B. Provine and S. I. Osborn, members of the board of directors of the Bank of Greenwood.

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Civic clubs over the state have named numerous attorneys as officers for the ensuing year. Among these are J. C. Roberts, who has been elected president of the Cleveland Exchange Club; John T. Smith, member of the Board of Commissioners, is a member of the board of control of this club; Leighton Miller has been elected president of the Young Men's Business Club of Clarksdale; W. C. Keady of Greenville and John E. Stone of Jackson head the Jaycees of their cities; Webb Overstreet and L. A. Smith, Jr., are president and secretary, respectively, of the Holly Springs Junior Chamber of Commerce; Leslie Darden is president, Hugh N. Clayton and R. L. Smallwood are members of the board of directors of the Chamber of Commerce of New Albany; Claude F. Clayton is president of the Tupelo Kiwanis Club; Holt Montgomery is vice-president of the Laurel Kiwanis and Warner Beard, Jr., is chairman of the committee on public affairs for the club; and Herbert Holmes is president of the Senatobia Rotary Club.

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Congratulations are in order for Robert W. Upchurch of Coffeeville, member of the Mississippi legislature, upon his recent marriage to Miss Tommie Williams.

This goes too, to the Emmett Wards of Vicksburg, and to Hugh and Elise Gillespie of Raymond upon the arrival of a baby daughter in each family.

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Carroll Kemp of Hazlehurst has been elected city attorney by the board of aldermen of that city to succeed J. H. Garth.

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Tom Trotter Ross of Clarksdale was one of the speakers at a recent banquet honoring Scout leaders from twelve delta counties.

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H. P. Farish and Jerome Hafter of Greenville, and W. C. Roberts of Rosedale have been elevated to offices in the Scottish Rite bodies in the Greenville jurisdiction.

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Members of the State Department of the American Legion legislative committee include R. R. Dinsmore, Jackson, Chairman; Luther Maples, Gulfport; E. J. Currie, Hattiesburg; W. C. Adams, Corinth; M. F. Pierce, Greenwood; B. B. Allen, Indianola; and Clay B. Tucker, Woodville. This committee is seeking worthwhile legislation by the present legislative session.

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W. E. Morse of Jackson on the committee on municipal law of the American Bar Association, and Mrs. Nell W. Hunt, McComb, as vice-president of the National Association of Women Lawyers, are appointments of interest.

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Miss Mary Sue Brannon, formerly of Winona, has opened offices at Aberdeen as government attorney to investigate war risk cases set for hearing in federal courts at Aberdeen, Clarksdale and Oxford.

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Samuel Earl Lackey, Jr., of Forest, has become associated with the firm of H. V. Watkins and Ralph B. Avery of Jackson, whose offices are in the Standard Life Building.

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Wm. Henry Cook is now associated with the firm of Powell, Harper & Jiggitts, and is also attorney for the J. S. Love Bonding Company. The offices of the firm and the bonding company are in the Deposit Guaranty Bank Building.

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The University Law School has recently been addressed by W. H. Watkins, prominent attorney of Jackson, and Marion W. Reily, president of the Mississippi State Bar. Mr. Watkins spoke on the

"Life of Albert Hall Whitfield," while Mr. Reily chose "The Lawyer" as his subject.

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Toxey Hall of Columbia took office on January 19th as United States District Attorney to succeed R. M. Bourdeaux of Meridian. W. J. Vollor of Vicksburg and A. Y. Harper of Jackson will serve as assistant attorneys. This will be Mr. Harper's second term in this capacity.

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S. M. Alford announces the opening of his law office in the Masonic Building in Brookhaven. He formerly practiced in Jackson.

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W. H. Clements of Rolling Fork was elected without opposition to the state senate from Sharkey and Issaquena Counties in a special election held on February 19th to fill the vacancy caused by the resignation of J. M. Cooper.

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Joe Sheffield of Calhoun City has announced his candidacy for United States Representative from the Fourth Congressional District.

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Fred Lotterhos, state bar commissioner from the seventh district, addressed the Pilot Club of Jackson on the progress of the bar association from the time of its reorganization in 1906 up to the present time. Other attorneys who were guests on this occasion were E. W. Stennett, Miss Louise Melton, Mrs. Elizabeth Hulen, and Mrs. Clara Sims, all of Jackson.

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B. A. Green of Mound Bayou contributed largely to the entertainment of Professor George W. Carver of Tuskegee Institute, who was the principal speaker at the celebration of 75 years of progress of negroes in Washington County.

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Since the last issue of the Journal, we list among the deceased: Henry C. Mounger of Greenwood; W. C. Martin of Natchez; R. D. Ford of Columbia; Jacob K. Hirsch of Vicksburg; and J. W. Green of Jackson, and extend sympathy to the bereaved families.

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The state bar mourned with President and Mrs. Marion W. Reily in the loss of their father, W. J. Miller of Washington, D. C., and Jackson. Condolence is also extended to P. H. Lowrey of Marks, in the death of his wife; to E. W. and J. C. Stennett of Jackson in the death of their brother, I. W. Stennett; to J. H. Garth in the loss of his sister, Mrs. Louise Turner of Canton; and to R. B. Reeves of McComb in the death of his brother, W. S. Reeves.

NOTES

Municipal Corporations—Torts—Obstructions of Streets and Sidewalks

Appellee sought to recover damages resulting from his falling over a penny scales platform which protruded four or four and one-half inches out onto a sidewalk of the city. The basis of the suit was that such protrusion made the public way defective—that the city had failed to discharge its duty of maintaining the same in reasonably safe condition.[1] The paved sidewalk on this side of the street was nine feet in width. Some years previous to the accident two adjoining brick business buildings had been constructed in such manner that their south wall was about nineteen inches from the north edge of the sidewalk. The property owners had paved this space, creating the deceptive appearance of an enlarged sidewalk, and had permitted a third person to place the penny scales against the front wall of the buildings, protruding as above indicated.[2] Appellee, Matthews, was thoroughly acquainted with the location of the scales and their protrusion over the walk. On a dark night, one Strahan drew a knife and made an unprovoked assault on appellee. The latter, while retreating, stumbled over the protruding platform of the scales and fell, sustaining serious injuries. In the lower court, the jury returned a verdict for appellee. On appeal, it was held as a matter of law, that the scales did not constitute such an obstruction as would make the sidewalk unreasonably defective.

The law applicable in the instant case is well settled in this state, and the rule as announced here is in entire accord with previous statements by the court:

> "The duty of a municipality to keep its streets and sidewalks reasonably safe for the traveling public is not an absolute one. Reasonable care to keep them reasonably safe for those using due care is the criterion. If the obstruction or the defect is one that the municipality in the exercise of ordinary care could not have reasonably foreseen would cause some injury, there is no liability."[3]

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[1]City of Hazlehurst v. Matthews, 176 So. 384 (Miss. 1937).

[2]The platform to the scales was 13½ inches wide at the bottom, 11½ inches wide at the top, approximately 5 inches high, and 23 inches long; therefore the platform extended over the original sidewalk about 4 or 4½ inches.

[3]City of Hazlehurst v. Matthews, 176 So. 384, 385 (Miss. 1937).

The first case in Mississippi laying down this rule is Bell v. City of West Point, 51 Miss. 262 (1875).

Probably the leading case in point is City of Meridian v. Crook, 109 Miss. 700, 712, 69 So. 182, 183 (1915), in which these words are used:

"It is a principle universally recognized in all the adjudicated cases that municipalities are only required to exercise ordinary care to keep and maintain their streets and sidewalks in a reasonably safe condition for the use of persons exercising ordinary care and caution; or, in other words, sidewalks must be reasonably safe."

City of Vicksburg v. Hennessy, 54 Miss. 391 (1877); Nesbitt v. City of Greenville, 69 Miss. 22, 10 So. 452 (1891); City of Greenville v. Laury, 172

The application of this rule is not limited to cases in which the accident occurs in the daytime. The rule applies equally to injuries occurring from accidents at night.[4]

We note that this rule makes it the duty of the municipality to use reasonable care to keep its streets reasonably safe *for those using due or ordinary care.* This, on first notice, seems to be contradictory to Mississippi's Comparative Negligence Statute,[5] which provides that: ". . . the fact that the person injured . . . may have been guilty of contributory negligence shall not bar a recovery." Upon consideration, however, we find that this is not true. This statute comes into operation only when it has been determined that the defendant is guilty of negligence. When this is found, the statute prevents the contributory negligence of the plaintiff from acting as a complete bar to recovery. In the rule outlined above, however, the phrase "for those using due or ordinary care" is a direct limitation on the *degree of care* required of the defendant city. It is a factor in determining whether or not the defendant has *breached its duty.* If the street is reasonably safe for those using due care, or if the city has used reasonable care to make it so, no party injured as a proximate result of its condition may recover. However, if the street is not reasonably safe for those using due care, or if the city has not used reasonable care to make it so, a party injured as a proximate result of its condition may recover. At this point the comparative negligence statute may operate to reduce the amount of damages awarded.

The difference in the degree of care required when the duty is to use reasonable care to make reasonably safe, and when the duty is to use reasonable care to make reasonably safe for those exercising ordinary care, is slight. However this distinction may offer sufficient judicial leverage to enable the court to reconcile results reached in decisions which otherwise might appear entirely inconsistent. Such conciliatory language affords a barricade behind which the court may impose a higher obligation on a private individual than it would care to place on a municipality similarly situated. It may thus manifest from ambush a certain leniency toward the political institution of a city because of the governmental responsibility of the latter. This same interest in the municipality as a political agency has prompted the courts in many jurisdictions to establish a general rule denying liability of a city for defective streets in the absence of a statute to the contrary.[6]

Miss. 118, 159 So. 121 (1935); Standard Oil Co., Inc. v. Decell, 175 Miss. 251, 166 So. 379 (1936).

[4]City of Pascagoula v. Kirkwood, 86 Miss. 630, 38 So. 547 (1905); City of Natchez v. Lewis, 90 Miss. 310, 43 So. 471 (1907); Jordan v. City of Lexington, 133 Miss. 440, 97 So. 758 (1923); Thomas v. City of Lexington, 168 Miss. 107, 150 So. 816 (1933); City of Vicksburg v. Scott, 168 Miss. 572, 151 So. 914 (1934).

[5]Miss. Code (1930) § 511.

[6]Comment (1930) 39 Yale L. J. 550; Note (1921) 7 Va. L. Rev. 383.

The basis of the liability of a municipality in actions of this type is negligence, and either actual or constructive notice to the city of the defect is necessary to fix liability. If the city itself is responsible for the defective condition of the street the requirement of notice is fulfilled.[7] The city is also chargeable with the common knowledge of mankind regarding the action of the elements on public ways it has constructed.[8] But where the municipality itself is not responsible for the defective condition, notice to it is necessary to fix liability.[9] This notice may be either actual or constructive. In *City of Greenville v. Middleton*[10] we find these words with reference to constructive notice:

> ". . . the general rule is well established that the facts and circumstances of each case must determine whether constructive notice of the defect is to be attributed to the municipal authorities, and ordinarily this is a question for the jury. There are many elements which may properly be considered by the jury in passing upon this question. No definite rule as to the length of time a defect must have existed to furnish notice to the municipal authorities can be fixed by the court, and whether notice shall be imputed to the city authorities is ordinarily a question for the jury to determine from the length of time the defect has existed, the nature or character thereof, the publicity of the place where it exists, the amount of travel over the street, and any other facts or circumstances in evidence which tend to show notoriety, and from which they may conclude that by the exercise of ordinary and reasonable care and diligence the defect should have been discovered by the corporate authorities."

From the above language it becomes apparent that the municipality is under a duty to make a reasonable inspection of its public streets. Failure to discharge this duty prepares the way for liability for the city's indifference. The phrase "constructive notice" is thus no more than a convenient statement and affirmation of the existence and violation of this duty. The problem then arises: Why have the courts of Mississippi consistently substituted language of "notice" for the equally convenient phrases of duty and negligence? While there is no real difference in the requirements of the two

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[7]City of Vicksburg v. McLain, 67 Miss. 4, 6 So. 774 (1889); Nesbitt v. City of Greenville, 69 Miss. 22, 10 So. 452 (1891); City of Jackson v. Carver, 82 Miss. 583, 35 So. 157 (1903); Jordan v. City of Lexington, 133 Miss. 440, 97 So. 758 (1923); City of Jackson v. Lewis, 142 Miss. 806, 108 So. 156 (1926).

[8]City of Jackson v. Carver, 82 Miss. 583, 35 So. 157 (1903). The same rule is applicable to structures in proximity to the sidewalk which become dangerous through natural deterioration. Nesbitt v. City of Greenville, 69 Miss. 22, 10 So. 452 (1891).

[9]City of Greenwood v. Harris, 89 Miss. 121, 42 So. 538 (1906); City of Hattiesburg v. Reynolds, 124 Miss. 352, 86 So. 853 (1921); Dow v. Town of D'Lo, 169 Miss. 240, 152 So. 474 (1934); and cases cited in note 7, *supra*.

[10]124 Miss. 310, 317, 86 So. 804, 805 (1921).

formulas, there is perhaps a difference in the reaction of the average man to their use. The word "inspection" indicates a requirement of affirmative action, whereas a statement that liability exists only after the reception of notice, actual or constructive, implies a less stringent degree of care. The phrase is more elastic, giving toward the city defendant. Thus the court, by a mere change of words, has again lightened the burden upon the city without embarrassment to itself or damage to the general substantive law of negligence. This is merely another example of the ways and means by which the court maintains a close control of the jury and directs the outcome of litigation.

In the case under consideration the question of notice to the city is removed by the admission of the mayor that the condition was known to the city for a long time.

One point involved in the instant case was completely ignored by the majority opinion, and was disposed of in the dissenting opinion with this statement:[11]

> "While not basing this opinion on the fact that the paved part between the original sidewalk and the buildings constituted a part of the street, I think that it did so, because when the concrete was extended from the sidewalk to the nearby buildings, making the appearance of a street the entire way, the public had the right to regard it all as the street, and manifestly the city so treated it, as well as the traveling public."

If, as stated, the city regarded this strip as a part of the sidewalk, the majority is mistaken in its statement that the platform of the scales extended only four or four and one-half inches over the walk. The position that the city was under a duty to make this portion reasonably safe seems to be the general rule in the United States and has been adhered to in a previous Mississippi decision. In the case of *City of Meridian v. Peterson*[12] we find the following declaration:

> "An abutting property owner has the right to construct a bridge over a ditch in a street in front of his premises in order to obtain access thereto from the street, provided it is constructed in such way as not to interfere with the rights of the public, but when such bridge is constructed by an abutting owner, the municipality is under no obligation to maintain or repair it, unless it is of utility to and used by the general public. There must be both public user and public utility to fix liability on a municipality to repair such a bridge."

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[11]City of Hazlehurst v. Matthews, 176 So. 384, 386 (Miss. 1937).

[12]132 Miss. 7, 19, 95 So. 625 (1923).

In a decision handed down by the Supreme Court of South Carolina[13] we find the following:

> "It would be a strange misapplication of the law to permit a municipal corporation to escape liability because it refused to recognize its duty. When the lot holder where the gate was set his fence back six feet, as he did, and thereby dedicated that space for a sidewalk for the public, and when the public so used that space as it did, then the law cast upon the corporation the duty to keep it in reasonably safe condition for use."[14]

To hold that this nineteen inch strip of pavement was a part of the sidewalk, and that the city was under the same duty with reference to it that it was under toward the original sidewalk, would not of necessity render the conclusion of the court incorrect, but it would strengthen the appellee's case.

There is no difficulty in determining the principles of law governing a case of this nature. The difficulty comes in applying them to a given set of facts. Here we have determined that the city owes a duty to the traveling public. But if the plaintiff is not one of the traveling public—one of the class for whose benefit the rule was promulgated—he cannot take advantage of its benefits, and will be barred from recovery, although the city may have been negligent. Our court has recognized this principle and has refused recovery when the plaintiff's injury resulted because of misuse of the street. In the case of *Jackson v. City of Greenville*[15] the plaintiff was injured by catching his foot in a crack in a plank sidewalk while playing with a dog. The court refused to allow recovery and held as a matter of law that the plaintiff's use of the street was so foreign to its intended use that he did not come within the class of persons protected by the rule under consideration. However, it is not necessary, in order to be a traveler, that one be continually moving along the street toward some destination.[16] One does not forfeit his rights merely because he stops for a conversation with a friend,[17] or to admire the show-windows in shops,[18] or to see some unusual happening in the vicinity.[19] Such inter-

[13]Caston v. City of Rock Hill, 107 S. C. 124, 130, 92 S. E. 191, 193 (1917).

[14]The case of Foxworthy v. City of Hastings, 25 Neb. 133, 41 N. W. 132 (1888), *s. c. on second appeal*, 31 Neb. 825, 48 N. W. 901 (1891), is very similar to the case at bar and the court there held that the portion of the sidewalk in front of a hotel, paved by the property owner, having the same appearance as the original sidewalk, and controlled by the municipality, was a part of the sidewalk, and that the city was under a duty to keep it reasonably safe.

[15]72 Miss. 220, 16 So. 382 (1894).

[16]Silverman v. Usen, 128 Me. 349, 147 Atl. 421 (1929); Britton v. Cummington, 107 Mass. 374 (1871); Smethurst v. Church, 148 Mass. 261, 19 N. E. 387 (1889).

[17]Beaulieu v. Tremblay, 130 Me. 56, 153 Atl. 353 (1931).

[18]Leighton v. Dean, 117 Me. 40, 102 Atl. 565 (1917).

[19]Schmitt v. City of Syracuse, 190 App. Div. 930, 179 N. Y. Supp. 949 (1919), *aff'd*, 229 N. Y. 161, 128 N. E. 119 (1920).

ruptions are normal incidents to public travel and are matters to be reasonably anticipated by the city. In the present case the appellee was making an unusual use of the sidewalk, a use which required a more commodious public way than financial expediency on the part of the municipality would permit. It is submitted that recovery was properly refused for the above reason. Denial of liability cannot properly be based on an idea of "misuse." The appellee's conduct was normal and natural in view of the exigency in which he found himself. It was unusual, but not improper. Hence he is barred from recovery, not through any idea of "fault" on his part, but rather because he demands a degree of preparation by the municipality which it cannot be reasonably expected to afford. There is no evidence that the obstruction here was of such nature as would imperil a person making a normal use of the way. This was expressly recognized by the court:[20]

> "Here we have a sidewalk 9 feet wide, wide enough for at least four persons to walk abreast without crowding or inconvenience, and still be free from the danger of coming in contact with the protruding platform of the scales."

In disposing of the instant case the court drew a distinction between depressions and protrusions in a public thoroughfare. Although not necessary to the decision, this distinction is one which may properly be of importance. A protrusion is likely to be the result of positive misconduct. It carries with it the idea of affirmatively placing an obstruction in a public way. Such conduct is more likely to result in liability than the mere passive inaction of a municipality when a state of disrepair, such as a misplaced or loose brick in a brick sidewalk,[21] a small crack in a piece of pavement,[22] or an uneven block in a cement walk,[23] is allowed to exist. However, any such distinction is entirely relative. Liability may

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[20]City of Hazlehurst v. Matthews, 176 So. 384, 385 (Miss. 1937).

[21]City of Meridian v. Crook, 109 Miss. 700, 69 So. 182 (1915); Hamilton v. City of Buffalo, 173 N. Y. 72, 65 N. E. 944 (1903); Butler v. Village of Oxford, 186 N. Y. 444, 79 N. E. 712 (1906); Stratton v. City of New York, 190 N. Y. 294, 83 N. E. 40 (1907); Morris v. City of Philadelphia, 195 Pa. 372, 45 Atl. 1068 (1900); Waggener v. Town of Point Pleasant, 42 W. Va. 798, 26 S. E. 352 (1896).

[22]City of Greenville v. Laury, 172 Miss. 118, 159 So. 121 (1935).

[23]Whiting v. National City, 61 P. (2d) 504 (Cal. 1936), *rev'd*, 69 P. (2d) 990 (Cal. 1937).

[24]Whitfield v. City of Meridian, 66 Miss. 570, 6 So. 244 (1889); City of Natchez v. Lewis, 90 Miss. 310, 43 So. 471 (1907); Saxon v. Town of Houlka, 107 Miss. 161, 65 So. 124 (1914); Higginbottom v. Village of Burnsville, 113 Miss. 219, 74 So. 133 (1917); Jordan v. City of Lexington, 133 Miss. 440, 97 So. 758 (1923); Dent v. Town of Mendenhall, 139 Miss. 271, 104 So. 82 (1925); Standard Oil Co., Inc. v. Decell, 175 Miss. 251, 166 So. 379 (1936); George v. Haverhill, 110 Mass. 506 (1872); Moroney v. City of New York, 49 Misc. Rep. 307, 97 N. Y. Supp. 642 (1906), *aff'd*, 177 App. Div. 843, 103 N. Y. Supp. 1135 (1906), *aff'd*, 190 N. Y. 560, 83 N. E. 1128 (1908); Conley v. Village of Hudson Falls, 162 App. Div. 234, 147 N. Y. Supp. 567 (1914).

arise from passive neglect[24] as well as from active misconduct.[25] Furthermore, even in case of protrusions, passive neglect is the gist of the wrong by the municipality when, as here, the protrusion is placed on the public way by some person other than the defendant.[26] Similarly, a depression may be the result of active misconduct, as where a municipality makes an excavation in a public way and neglects to give adequate warning of the peril.[27] If the court wishes to distinguish active misconduct from passive indifference, it only approximates the idea in mind by separating injuries occasioned by protrusions from those which result from depressions. Liability has been imposed by the Mississippi court in the case both of depressions[28] and protrusions.[29] The result of any decision will rest largely on the facts of the concrete case—the extent

[25]Stainback v. City of Meridian, 28 So. 947 (Miss. 1900), *s. c. on second appeal*, 79 Miss. 447, 30 So. 607 (1901); City of Meridian v. McBeath, 80 Miss. 485, 32 So. 53 (1902); Yazoo City v. Loggins, 145 Miss. 793, 110 So. 833 (1927); Gould v. Town of Newton, 157 Miss. 111, 126 So. 826 (1930); Town of Senatobia v. Dean, 157 Miss. 207, 127 So. 773 (1930); Thomas v. City of Lexington, 168 Miss. 107, 150 So. 816 (1933); Wilkinson v. City of Jackson, 177 Miss. 414, 170 So. 901 (1936); Standard Oil Co. v. Hodges, 103 S. W. (2d) 927 (Ark. 1937); Lion Oil Co. v. Boyd, 107 S. W. (2d) 530 (Ark. 1937); Wood v. Third Ave. R. R. Co., 91 Hun 276, 36 N. Y. Supp. 253 (1895), *aff'd*, 157 N. Y. 696, 51 N. E. 1094 (1898); Archer v. City of Mt. Vernon, 57 App. Div. 32, 67 N. Y. Supp. 1040 (1901); Priess v. City of New York, 69 Misc. Rep. 492, 127 N. Y. Supp. 498 (1910).

[26]Whitfield v. City of Meridian, 66 Miss. 570, 6 So. 244 (1889); City of Hazlehurst v. Matthews, 176 So. 384 (Miss. 1937); Conley v. Village of Hudson Falls, 162 App. Div. 234, 147 N. Y. Supp. 567 (1914).

[27]Stainback v. City of Meridian, 28 So. 947 (Miss. 1900), *s. c. on second appeal*, 79 Miss. 447, 30 So. 607 (1901); Yazoo City v. Loggins, 145 Miss. 793, 110 So. 833 (1927); Thomas v. City of Lexington, 168 Miss. 107, 150 So. 816 (1933).

[28]Whitfield v. City of Meridian, 66 Miss. 570, 6 So. 244 (1889) (abrupt descent of 5 or 6 feet at unlighted street intersection); Stainback v. City of Meridian, 28 So. 947 (Miss. 1900), *s. c. on second appeal*, 79 Miss. 447, 30 So. 607 (1901) (excavation enlarging ditch across street); City of Natchez v. Lewis, 90 Miss. 310, 43 So. 471 (1907) (hole of several feet extending 12 inches in from edge of sidewalk); Saxon v. Town of Houlka, 107 Miss. 161, 65 So. 124 (1914) (hole in street covered by mud and water); Higginbottom v. Village of Burnsville, 113 Miss. 219, 74 So. 133 (1916) (hole 1 foot deep, 2 feet wide, extending 1/3 of way across 20 foot street); Jordan v. City of Lexington, 133 Miss. 440, 97 So. 758 (1923) (reduction of 4-plank walk to 3-plank walk, with hole at end of 4th plank); Yazoo City v. Loggins, 145 Miss. 793, 110 So. 833 (1923) (ditch across sidewalk); Town of Senatobia v. Dean, 157 Miss. 207, 127 So. 773 (1930) (intentional removal of iron grating over storm sewer); Thomas v. City of Lexington, 168 Miss. 107, 150 So. 816 (1933) (ditch 8 feet wide, 7 feet deep, located in curve without sufficient warning); Standard Oil Co., Inc. v. Decell, 175 Miss. 251, 166 So. 379 (1936) (uncovered grease pit adjoining walk); Wilkinson v. City of Jackson, 177 Miss. 414, 170 So. 901 (1936) (improper construction of depression connecting with storm sewer).

[29]City of Meridian v. McBeath, 80 Miss. 485, 32 So. 53 (1902) (post 2½ feet high located 2 feet from corner of intersection in 30 foot street); Gould v. Town of Newton, 157 Miss. 111, 126 So. 826 (1930) (2 by 4 inch stake protruding one inch at intersection of two main business streets).

of the defect,[30] its location,[31] the seriousness of the harm threatened,[32] and the use being made of the public way at the time of the injury.[33] The economic feasibility of requiring a higher degree of care on the part of the municipality in each instance is likely to be the controlling factor.

C. Sidney Carlton

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[30]Liability has been imposed for depressions as shown in note 28, *supra*; liability has been imposed for protrusions as shown in note 29, *supra*. Liability has been denied in the following cases: Butler v. Town of Oxford, 69 Miss. 618, 13 So. 626 (1891) (10 inch slope in level of roadway); City of Meridian v. Hyde, 11 So. 108 (Miss. 1891) (plaintiff fell off elevated sidewalk); Town of Union v. Heflin, 104 Miss. 669, 61 So. 652 (1913) (crack in plank sidewalk); City of Meridian v. Crook, 109 Miss. 700, 69 So. 182 (1915) (misplaced brick in sidewalk); City of Hazlehurst v. Shows, 113 Miss. 263, 74 So. 122 (1917) (horse shied at sight of boiler at bottom of elevated roadway); McComb City v. Hayman, 124 Miss. 525, 87 So. 11 (1921) (gully near edge of roadway); City of Greenville v. Laury, 172 Miss. 118, 159 So. 121 (1935) (crack in street, ½ to 3 inches wide and 18 to 24 inches long).

[31]City of Meridian v. McBeath, 80 Miss. 485, 32 So. 53 (1902) (post on busy street intersection; recovery allowed); Saxon v. Town of Houlka, 107 Miss. 161, 65 So. 124 (1914) (defective roadway on main street; recovery allowed); City of Meridian v. Crook, 109 Miss. 700, 69 So. 182 (1915) (misplaced brick in residential sidewalk; recovery denied); Gould v. Town of Newton, 157 Miss. 111, 126 So. 826 (1930) (2 by 4 stake protruding 1 inch at intersection of two main business streets of town; recovery allowed).

[32]In the following cases, in which the harm threatened seems to have been slight, recovery was denied by the court: Butler v. Town of Oxford, 69 Miss. 618, 13 So. 626 (1891); Jackson v. City of Greenville, 72 Miss. 220, 16 So. 382 (1894); Town of Union v. Heflin, 104 Miss. 669, 61 So. 652 (1913); City of Meridian v. Crook, 109 Miss. 700, 69 So. 182 (1915); City of Greenville v. Laury, 172 Miss. 118, 159 So. 121 (1935).

But in the case of Gould v. Town of Newton, 157 Miss. 111, 126 So. 826 (1930), in which the injury threatened seems to have been slight, the court allowed recovery.

In the following cases, in which the harm threatened seems to have been comparatively serious, recovery was allowed by the court: City of Meridian v. McBeath, 80 Miss. 485, 32 So. 53 (1902); Jordan v. City of Lexington, 133 Miss. 440, 97 So. 758 (1923); Dent v. Town of Mendenhall, 139 Miss. 271, 104 So. 82 (1925); Yazoo City v. Loggins, 145 Miss. 793, 110 So. 833 (1927); City of Senatobia v. Dean, 157 Miss. 207, 127 So. 773 (1930); Thomas v. City of Lexington, 168 Miss. 107, 150 So. 816 (1933).

[33]Recovery was denied in the following cases: City of Vicksburg v. Hennessy, 54 Miss. 391 (1877) (plaintiff was intoxicated); City of Meridian v. Hyde, 11 So. 108 (Miss. 1891) (plaintiff's testimony showed no care for his own safety); Jackson v. City of Greenville, 72 Miss. 220, 16 So. 382 (1894) (plaintiff was playing with dog on sidewalk); City of Meridian v. Stainback, 79 Miss. 447, 30 So. 607 (1901) (plaintiff crossed ditch in face of warning guards); Gulfport & Mississippi Coast Traction Co. v. Manuel, 123 Miss. 266, 85 So. 308 (1920) (reckless driving); Mississippi Power Co. v. Sellers, 160 Miss. 512, 133 So. 594 (1931) (reckless driving). In each of these cases, the use of the plaintiff required a degree of preparation by the municipality which it cannot reasonably be expected to afford.

Deeds Testamentary in Nature—Mississippi Law

Will an instrument in all other aspects a deed become testamentary solely because the grantor inserts a clause stipulating that the deed shall not take effect until after the death of the grantor? The answer depends entirely upon the construction of this clause by the court. If the language is strictly construed and given its exact technical literal meaning, then the answer must be in the affirmative.[1] However the majority of the courts construe the language very liberally and base their decisions entirely upon intent.[2] It has been suggested that such language be deemed *prima facie* to indicate a testamentary intention.[3] In *Smith v. Buffington*,[4] decided in 1936 by the Supreme Court of Mississippi, this state was apparently definitely committed to the minority view. The instrument construed in the case was in all aspects a deed except for a proviso which stated that "this deed shall not take effect or be of any force whatever during the lifetime of the said Alice Buffington but immediately upon her death the same shall be in full force and effect."[5] In affirming a decree of the chancellor holding the document a will, the court said: "Under the decision in *Tapley v. McManus*[6] and in previous decisions of our court referred to in that opinion, the chancellor could have reached no other conclusion."[7] Since the court is basing its decision primarily on former opinions a review of these decisions is necessary for an intelligent consideration of the basis for the holding in this case.

The first Mississippi case which touches upon the problem is *Harrington v. Harrington*.[8] An instrument had been held in an action at law to be a will and therefore revoked by a later will. Contending that it was intended by the parties to be a deed of gift, the defendant in the action at law brought a bill in equity to have the instrument reformed. He was not granted any relief because

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[1]Ranson v. Pottawattamie, 168 Iowa 570, 150 N. W. 657 (1915); Moody v. Macomber, 159 Mich. 657, 124 N. W. 549 (1910); see also Leonard v. Leonard, 145 Mich. 563, 108 N. W. 985 (1917); 8 R. C. L. 933, n. 20.

[2]Abney v. Moore, 106 Ala. 131, 18 So. 60 (1895); Latimer v. Latimer, 174 Ill. 418, 51 N. E. 548 (1898); Spencer v. Robbins, 106 Ind. 580, 5 N. E. 726 (1886); Lauck v. Logan, 45 W. Va. 251, 31 S. E. 986 (1898); Reynolds v. Balding, 183 Ark. 397, 36 S. W. (2d) 402 (1931); White v. Webster, 170 Okla. 250, 39 P. (2d) 22 (1935); *Cf.* Hair v. Dollarhide, 116 Okla. 180, 244 Pac. 813 (1926).

[3]2 Tiffany, Real Property (2d ed. 1920) § 467. *Cf.* Nichols v. Nichols, 168 Cal. 444, 143 Pac. 712 (1914), in which such a clause was said to be strong, if not conclusive, evidence of an intention that the instrument shall operate as a will and not as a conveyance.

[4]Smith v. Buffington, 176 Miss. 889, 170 So. 816 (1936). The words of Justice Anderson were: "An instrument in the form of a deed not to become effective until the death of the maker *is* a will, not a deed." Italics supplied.

[5]*Id.* at 893, 170 So. at 817.

[6]175 Miss. 849, 168 So. 51 (1936).

[7]Smith v. Buffington, 176 Miss. 889, 893, 170 So. 816, 817 (1936).

[8]2 How. 701 (Miss. 1838).

the court was not convinced by the proof[9] that the intention of the "grantor" was to make a deed instead of a will.[10] If the evidence was not enough to convince the court of equity as to the intent of the maker, the law court was therefore unquestionably correct in its interpretation. This decision is certainly not authority for the holding in *Smith v. Buffington.*

The precise question was submitted to the court for the first time in *Wall v. Wall.*[11] Here, a man conveyed land to his brothers and sisters. The document was in the form of a deed and contained this proviso: "the deed to take effect, as far as regards the handing over of the property at my death; and I reserve to myself the right to revoke it at any time during my life, by filing in clerk's office a written revocation, under my hand and seal. And I do hereby make known and declare that the signing, sealing, and delivery of this deed, and placing the same amongst my papers is intended by me as a delivery of said property at my death, and to take effect at that time."[12] The court in interpreting the effect of that clause said:

> "If the legal character of the instrument depended entirely upon this provision, it would be difficult to avoid the conclusion, that it was not intended to take effect in any aspect until the maker's death. But its character must be determined upon a consideration of all of its parts, comparing one part with another in order to ascertain the purpose which the party had in view, and the mode by which he intended to accomplish it."[13]

The language of the court in clear and unmistakable terms shows that at this early date it was ready to view each and every part of the instrument in connection with its other parts. This case seems to accord with the present majority view.

In *Sartor v. Sartor*[14] the question was presented again. The grantor executed an instrument in the form of a deed giving all of his property to his wife with provision that if she married it was all to go to his niece. There was nothing else in the instrument which indicated whether the maker intended it to take effect before or after his death; but the court, upon consideration of the

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[9]The evidence showed that although the grantor called the instrument a deed she also spoke of the property as belonging to her heirs, and requested certain sums to be given by the heirs to certain individuals at grantor's death.

[10]The court said: "There is no doubt but courts of equity will interpose to correct palpable mistakes, for the purpose of carrying into effect the intention of the parties where that intention is clearly shown, but the proof should be clear beyond a doubt, because, that it is better that a doubtful written instrument should stand, than that a doubtful provision should be substituted by parol testimony." 2 How. 701, 718 (Miss. 1838).

[11]30 Miss. 91 (1855).

[12]*Id.* at 94.

[13]*Id.* at 97.

[14]39 Miss. 760 (1861).

fact that he gave all of his estate, thought it was highly improbable that he intended the gift to take effect before his death and therefore held the instrument a will. Here, too, consideration was given the intent of the maker as evidenced by the instrument as a whole.

Cunningham v. Davis[15] presents a similar problem. The instrument was in the form of a deed and contained a provision that "this deed do not take effect until after my death." There was also a direction that the beneficiary should pay the maker's debts and have only the remaining property. The court in its holding said:

> "The provision in these words, 'And this deed do not take effect until after my death,' *coupled* with the direction that the object of the bounty of the maker of the instrument should pay all his debts and have only the remainder of his property, convinces us that the paper was testamentary in its character."[16]

The court apparently placed as much stress on the second condition as the first and the case cannot be said to be an authority for the minority view.

In *Thomas v. Byrd*[17] an instrument was executed by three brothers who were engaged in the operation of a plantation. This instrument provided that on the death of any one of them, his interest in the property was to vest in the others.[18] This was not an attempt to convey any interest in the property either immediately or in the future. The object sought to be accomplished was to cause whatever property each of the parties might own at his death to vest, when that event occurred, in the surviving party or parties. The court was therefore justified in reversing a decree of the chancellor holding the instrument a deed.

The next case was that of *Simpson v. McGee*.[19] Here, the instrument was in all aspects a deed except for a provision that "this is to take effect only after the death of said Harriet Hudson." The chancellor below had found as a question of fact that the instrument was a deed. In a rather brief opinion in which it reversed the decision of the chancellor, the court said: "It is clear from the language hereinbefore quoted that it was donor's intention that the instrument itself should not take effect for any purpose until after death."[20] The court apparently thought that when such language was used that there was but one possible meaning, and was basing its decision entirely upon the strength of that clause. It declares that its decision is based upon "the rule announced in *Wall v. Wall*,

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[15]62 Miss. 366 (1884).
[16]*Id.* at 368. Italics supplied.
[17]112 Miss. 692, 73 So. 725 (1916).
[18]The instrument when construed as a whole clearly shows nothing was intended to pass until death.
[19]112 Miss. 344, 73 So. 55 (1916).
[20]*Id.* at 348, 73 So. at 55.

and applied in *Sartor v. Sartor* and *Cunningham v. Davis*." The court does not discuss any of the cases cited, and seems to lay down as a matter of law that where such a clause appears that the instrument is a will.[21]

Since *Simpson v. McGee* was the first case in which the court held as a matter of law that such a clause rendered the instrument testamentary, it might have been supposed, in view of previous decisions on the question, that the case was a legal sport. But that supposition was exploded when the same question was again presented in *Cox v. Reed*.[22] The court in reversing the decision of the chancellor and holding the instrument a will, although citing *Wall v. Wall*, *Sartor v. Sartor*, and *Thomas v. Byrd* relied mainly on *Cunningham v. Davis* and *Simpson v. McGee*.[23] Of the cases referred to only *Simpson v. McGee* may be considered as precedent.

A similar conclusion was also reached in *Kelly v. Covington*.[24]

Evidence that the court is basing its decision entirely because of the exact wording, and technical meaning of the clause is found in the cases of *Stubberfield v. Haywood*[25] and *Graham v. Triplett*.[26] In the first of these cases the instrument was similar to those involved in the previous cases except that the exact words were not used stipulating that the conveyance was not to take effect until after death. The court in distinguishing this case from *Kelly v. Covington* said:

> "It was the conveyance that was not to take effect in that case and not the estate conveyed . . . . In the present case . . . . it is not the conveyance that is postponed but the enjoyment of the estate."[27]

In *Graham v. Triplett* the possession was postponed until grantor's death and there was no clause prohibiting the conveyance from taking effect until grantor's death. The court held the instrument a valid deed. These cases show that the court is basing its decision entirely on the particular words used in this conditional clause.[28]

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[21]This view seems stranger still when we consider that the clause used by the grantor is not at all clear as to what interpretation should be given the word "this." The grantor may have either been referring to the "conveyance" or to the "possession." See MISS. CODE (1930) § 2110, enacted, 1857.

[22]113 Miss. 488, 74 So. 330 (1917).

[23]The court also took the following quotation from the Cunningham case: "If by it any present interest was vested it should be held a deed. If it was not to have any operation or effect until the death of the maker it could not be treated as a deed, although it was so named, and is in form a deed." 113 Miss. 488, 494, 74 So. 330, 331 (1917).

[24]119 Miss. 658, 81 So. 485 (1919).

[25]123 Miss. 481, 86 So. 295 (1920).

[26]148 Miss. 299, 114 So. 621 (1927).

[27]Stubberfield v. Haywood, 123 Miss. 481, 501, 86 So. 295, 296 (1920).

[28]*Cf.* Martin v. Graham, 114 Miss. 653, 75 So. 447 (1917), in which there was no express clause stipulating the time the deed was to take effect. The instrument was held a will as evidenced by the instrument as a whole.

In *Knight v. Knight*[29] the court once again reiterated the doctrine of *Simpson v. McGee* and held an instrument to be a will. This time it attempted to justify the decision upon legal reasoning rather than precedent, but it is apparently stating its holding as its reason. Thus:

> ". . . no interest was conveyed to his daughters which was to take effect before the death of the grantor. He parted with nothing to take effect during his lifetime; he could have at once conveyed a fee simple title to someone else. Therefore his daughters got nothing."[30]

In reality the only reason nothing was conveyed *in praesenti* was the holding of the court itself.

The two subsequent opinions have agreed in their holding.[31]

A review of the Mississippi decisions demonstrates, therefore, that although the state agreed with the majority view in the beginning, it has now, because of an erroneous interpretation of these earlier cases, become firmly entrenched in the minority view.[32]

The main argument of those who would give the words their exact meaning is that the inserted part shows an intent to convey nothing *in praesenti*, but only after the grantor's death. This would be true if the instrument were interpreted entirely in view of this clause, but these courts entirely overlook the rest of the instrument which may show just as strong an intent the other way. This interpretation presumes that the parties know and mean for each word to have its technical legal definition. Thus the Mississippi court holds that when the instrument provides that "possession" shall not take effect until death, it is a valid deed; whereas when it provides that the "conveyance" shall not take effect until death, it is not valid as a deed. It may frequently happen, however, that the latter words are used in an effort to express the former meaning. Another reason suggested in support of the minority view is that often an instrument of doubtful character is invalid if regarded as a conveyance while valid if regarded as a will.[33] Such reasoning would be sound if the instrument in question would always be invalid if held a deed.

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[29]133 Miss. 74, 97 So. 481 (1923).

[30]*Id.* at 78, 97 So. at 481.

[31]Tapley v. McManus, 175 Miss. 849, 168 So. 51 (1936), cited note 6, *supra;* Smith v. Buffington, 176 Miss. 889, 170 So. 816 (1936), cited note 4, *supra.*

[32]The only amelioration of this doctrine is found in the early case of Harrington v. Harrington, 2 How. 701 (Miss. 1838), cited note 8, *supra,* in which the language of the court indicated that where the evidence was strong enough the instrument might be reformed in equity. But when a deed is a gift a real difficulty arises. Eaton v. Eaton, 15 Wis. 259 (1862). *Cf.* Mecham v. Warburton, 1 Ch. Div. 435 (Ire. 1894).

[33]2 TIFFANY, REAL PROPERTY (2d ed. 1920) § 467.

The argument of those giving the words a more liberal interpretation is based entirely upon intent. Instead of construing one phase, the entire instrument is considered, and if necessary extrinsic facts and circumstances are considered in order to ascertain whether a particular instrument was or was not intended to operate as a will. This attitude seems far the better. The question should be one of fact and not one of law. If the problem arises before the death of the grantor then the parties themselves may be questioned and the true intent reached. Certainly the court could much more accurately ascertain the intent by questioning the parties than they could by taking one single clause.[34]

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[34]On the matter generally see Ballantine, *When Are Deeds Testamentary?* (1917) 30 HARV. L. REV. 508.

RECENT DECISIONS

TAXATION—UNINCORPORATED ASSOCIATION ORGANIZED TO CONTEST CONSTITUTIONALITY OF TAX AND PREVENT ITS PAYMENT—INJUNCTION AGAINST MEMBERS ON GROUND OF CIVIL CONSPIRACY.

The attorney-general, in behalf of the state, filed a bill in chancery court seeking to enjoin the defendants from further operating their trucks until they paid the motor vehicle tax due under a statute[1] imposing a mileage tax, and requiring operators to file regular reports of their mileage, it being "unlawful" to fail to so file. The auditor was empowered by statute to enforce the tax by entering chancery court and obtaining an injunction prohibiting the violator from using the streets and highways of the state for from one to six months, and a judgment for a monetary penalty based upon the amount of the tax. The action in this case contained a charge of civil conspiracy against a number of truck operators scattered over the state who had banded together into an unincorporated association, drawn up a so-called constitution and by-laws, and hired attorneys to represent the association. The sole purpose seems to have been to avoid payment of the mileage tax. Circulars and bulletins were sent out over the state advising other truck operators that the tax was unconstitutional and that the association attorneys would defend all those who would refuse to comply with the statute. The chancellor below refused jurisdiction in the suit, holding that the defendants had a right to do what they did, that whatever common interest in legal matters and questions of fact might have been present at the time of filing the bill, disappeared with the upholding of the constitutionality of the act, and that the state failed to show that it had been damaged in any way. HELD: The conclusions of the court below were erroneous. Inasmuch as the constitutionality of the law had been upheld in a previous case,[2] each of the vehicle operators acted unlawfully. Since the parties defendant had engaged in an unlawful conspiracy, they were all properly joined in this action to enjoin the conspiracy, and there was no misjoinder of parties. *State* ex rel. *Rice, Att'y Gen. v. Hasson Grocery Co.*, 177 Miss. 204, 170 So. 234 (1936).

Broadly speaking, it may be said that a conspiracy is a combination by two or more persons to do a legal act by illegal means, or to do an illegal act by legal means, either the end or the means or both being illegal.[3]

It may be stated at the outset that this case had in it certain definitely unlawful acts on the part of the defendants; (1) the action to defeat the act after it had been held constitutional in a previous case;[4] and (2) a failure to comply with the terms of the act ordering a filing of reports and making it "unlawful" to fail to so file.[5] Only part of these acts were done after the constitutionality of the tax had been upheld. The association had been formed

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[1]Miss. Laws 1934, c. 126.

[2]State v. Evans-Terry Company, 173 Miss. 526, 159 So. 658 (1934).

[3]The great majority of civil conspiracy cases today have to do with labor strikes, and the cases go from one extreme to the other as tolerance toward labor's right to organize for self-protection increases.

[4]State v. Evans-Terry Company, 173 Miss. 526, 159 So. 658 (1934). The fact that the defendants acted on advice of attorney that the statute was unconstitutional despite the case cited here was held immaterial in the Hasson case on the theory that the defendants acted upon such advice at their peril.

[5]Miss. Laws 1934, c. 126, § 21.

previously to such decision, but the defendants still refused to file reports or pay taxes after the decision had been rendered. The "unlawful" acts following the *Evans-Terry* case[6] may be partly the reason for the supreme court decision.

Were the acts of the defendants declared unlawful because they failed to file reports or because they failed to pay their taxes? If it was because they failed to pay their taxes, would such failure by an individual be unlawful? If such question were to be answered in the negative, the further question follows whether the combining in such refusal would of itself make the refusal illegal, and thus a conspiracy.

Whether or not an act which is legal when done by an individual becomes illegal when done by a group is controversial.[7] The minority holding is in the negative, the asserted justification being that the determining factor in conspiracy is motive.[8] Such theory is based on the presence or absence of malice toward the party injured. This test seems rather inapplicable, save in extreme cases, due to the vagueness of the line separating malice and good-will.[9] The malice theory could, however, be put to use in the present case in light of the fact that the combining to refuse tax payments might be construed as lack of good faith toward the state. Defendants failed to pay even after they knew that the tax was constitutional.

In actions for civil conspiracy, the plaintiff is always the party who has been injured by the combination.[10] Only he can bring the action, it being

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[6]173 Miss. 526, 159 So. 658 (1934). The question arises in one's mind here, what would be the remedy if some future statute were construed to mean that once having paid money in, the taxpayer could not recover it. Then, if the taxpayer refused to pay, he would be acting unlawfully. If several combined and refused to pay, there would be a conspiracy. And if the individual, or the group, paid the tax, even though it were later declared an unlawful tax, there could be no recovery.

[7]Cases holding that act lawful when committed by one is lawful when committed by combination: Menner v. Slater, 148 Cal. 284, 83 Pac. 35 (1905); De Wulf v. Dix, 110 Iowa 553, 81 N. W. 779 (1900); Boston v. Simmons, 150 Mass. 461, 23 N. E. 210 (1890); Macauley v. Tierney, 19 R. I. 255, 33 Atl. 1 (1895); Dely v. Winfree, 80 Tex. 400, 16 S. W. 111 (1891); Wills v. Central, *etc.*, Ice Co., 39 Tex. Civ. App. 483, 88 S. W. 265 (1905). Cases holding that act lawful when committed by one may be unlawful when committed by combination: Cornellier v. Haverhill Shoe Mfgs. Ass'n, 221 Mass. 554, 109 N. E. 643 (1915); Pickett v. Walsh, 192 Mass. 572, 78 N. E. 753 (1906); Burnham v. Dawd, 217 Mass. 351, 104 N. E. 841 (1914); Bailey v. Master Plumbers, 103 Tenn. 99, 52 S. W. 853 (1899); State v. Huggin, 110 Wis. 189, 85 N. W. 1046 (1901).

[8]Cheshire, *Unlawful Molestation* (1923) 39 L. Q. Rev. 193, 204, states as follows: ". . . the mere element of numbers will not affect the legality of an act. If 50 people combine together to do something which one man might legitimately have done alone, it is not the law of this country that you can regard them as forming an illegal combination and render them liable on conspiracy." In other words, the motives of many may have an effect which the motives of one could not have. The state, in the principal case, takes the viewpoint that motive is immaterial.

[9]There is no line which can clearly separate "action with malice" from "action with self-interest." A man may legally protect himself so long as he stays within certain bounds; if he goes so far in his zeal to protect his own interests that he infringes upon the rights of others, he has acted with a degree of malice toward those others.

[10]Robinson v. Van Hooser, 196 Fed. 620 (C. C. A. 6th, 1912); Levy v. Collins, 115 La. 204, 38 So. 966 (1905); Nelson v. McMillan, 86 Wis. 82, 56 N. W.

necessary for the declaration to allege that defendant acted unlawfully to the injury of plaintiff. It must be remembered that this is a civil action; there is no indictment filed and no charge of felonious action, such being punishable by criminal conspiracy proceedings. The term "unlawfully" is used here not in its strict sense, but rather implies a tortious action incurring only civil liability. The concept of conspiracy is carried over into civil suits for the practical reason that by making the charge of civil conspiracy the plaintiff is able to collect damages from defendants jointly and severally under conspiracy law.[11] This benefit is granted plaintiff because the courts feel that though a combination for a purpose not felonious in nature may not be a danger to the life and property of the state as such, such combination can nevertheless inflict much greater damage upon the individual than could a lone tort-feasor, and thus it is just to grant the injured party the same aid in collecting his damages that is granted the state in criminal conspiracy proceedings.

The party claiming injury in the *Hasson* case, by civil action, is the state. The injury presumably consisted of the defendants' use of the roads without compensation to the state, and of the forming of a combination to persuade operators to refuse both to pay their taxes and to file reports, thus greatly hindering tax collections. If collections of taxes are interfered with to any great extent the state is unquestionably injured. Also, the combination may be said to have been formed to hinder a state officer, the auditor delegated by the statute to make collections, in the performance of his duty.

This is a unique case, no similar decision having been found in which action has been brought in court against a combination formed to resist tax payments. In the early history of the United States, Shay's Rebellion and the Whiskey Rebellion are well-known instances of attempts to prevent the imposition or collection of certain taxes. But both involved force and were met by force.[12] Here, there was no force; the case was fought out in the courts by civil procedure. It is to be noted that the state in its brief cited no case on all fours with the present one.[13] This case is interesting in that it presented to the court an unprecedented set of facts, facts so broad in their scope as to require new law.

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327 (1916). In civil conspiracy actions, punitive damages are also awarded plaintiff in many instances. Doremus v. Hennessey, 176 Ill. 608, 52 N. E. 924 (1898). But we cannot say that this is actually punishing the conspiracy as such because the same punitive damages would lie in many instances were the defendants individuals. Punitive damages are allowed only where there is actual injury. Summers v. Keller, 152 Mo. App. 626, 133 S. W. 1180 (1911); Kruegel v. Cobb, 58 Tex. Civ. App. 449, 124 S. W. 723 (1910).

[11]Anderson v. Smith, 102 Va. 697, 48 S. E. 29 (1904); Schultz v. Frankfort Marine, *etc.*, Ins. Co., 151 Wis. 537, 139 N. W. 386 (1913).

[12]*Cf.* Findlay v. McAllister, 113 U. S. 104, 28 L. ed. 930 (1885), where certain inhabitants of a county had combined to prevent collection of a tax to pay a judgment which plaintiff had against county, and by threats and hostile demonstrations had prevented collection thereof and payment of the judgment, and it was held that such combination constituted a conspiracy which would support an action against them by owner of the judgment. Here, also, there was use of force and threats of violence. But this case is more nearly in point with the instant case than any other which has been discovered.

[13]A representative few of the cases cited by the state are: Arthur v. Oakes, 63 Fed. 310 (C. C. A. 7th, 1894) (power of equity court, having custody by receivers of railroad and other property of corporation to enjoin combination upon part of receivers' employees and their associates in labor organiza-

What will be the effect of the decision on future similar cases? The main purpose of the state was to collect a tax; there was not much concern over the failure to file reports. But the failure to file reports was the act made unlawful by statute. It was provided by the act that the chancery court entertain suits against offenders;[14] in view of the effect of failure to obey an injunction from chancery, it is to be noted that jail faces offenders for contempt of court. Certainly the statute has teeth in it. It may be that in the future the courts will hold that in this case the failure to file was the only unlawful act; but should they choose, they could in all probability hold that the unlawful act also consisted of the failure to pay the tax. This would indeed be a new development in tax law, and of great benefit to the tax collector. Perhaps this case may in the future be distinguished or limited because of any or all of the special features of this case listed above. These are: (1) refusal to comply with the statute after it had been held constitutional; (2) failure to file reports when the statute made such failure unlawful; (3) the fact that the statute referred the collector to chancery court; and (4) a combining to obstruct an officer in the performance of his duty. But the court need not choose

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tions, which, if not restrained, would do irreparable mischief to such property, and prevent receivers from discharging duties imposed by law upon corporation); Love v. Calif. St. Fed. of Labor, 139 Fed. 71 (C. C. N. D. Calif. 1905) (action in equity for preliminary injunction to enjoin boycott); U. S. v. Patten, 226 U. S. 525, 57 L. ed. 333 (1912) (criminal prosecution under Sherman Anti-Trust Act); Anderson v. Shipowners' Ass'n, 272 U. S. 359, 71 L. ed. 298 (1926) (operators' and shipowners' combination to control employment of seamen on vessels held to be within provision of Anti-Trust Act); Gebardi v. U. S., 287 U. S. 112, 77 L. ed. 206 (1932) (persons charged with conspiracy to violate Mann Act); Randall v. Lonstrof, 126 Wis. 147, 105 N. W. 663 (1905) (civil action for damages from conspiracy to separate wife from husband, reducing her to penury, and enabling husband to obtain divorce on fraudulent allegations in a foreign jurisdiction). From the nature of cases cited in its brief, it is obvious that the state had little precedent for its action.

Two cases, not cited by the state, were somewhat more in line, because they involve situations where the conspiracy of the defendants was interfering with a governmental function, and the government was the injured party. The first is Fraine v. U. S., 225 Fed. 28 (C. C. A. 2d, 1918), where it was held that persons, in agreeing to fail and neglect to perform fully duties required of them in the execution of the Selective Service Act, and to aid, induce, counsel or procure others to do likewise, were guilty of criminal conspiracy. Reeder v. U. S., 262 Fed. 36 (C. C. A. 8th, 1919), *cert. denied*, 252 U. S. 581, 64 L. ed. 726 (1920), in which defendants in a prosecution for conspiracy had agreed to procure arms and ammunition by force, arm themselves, and offer individual and combined resistance to the enforcement of the Espionage Act, and it was held that a conspiracy was complete when the agreement was entered into.

[14]Chancery court took jurisdiction here on the ground that there was a conspiracy, but it is to be noted that the statute expressly refers the auditor to chancery. Miss. Laws 1934, c. 126, § 21. For some reason, the statutory provision does not seem to have been relied upon by the court, chancery taking jurisdiction only on conspiracy grounds. The fact that an injunction is granted the auditor by the act may partly explain this; but chancery is also given power by the statute to place a fine which includes the amount of the tax. This statutory provision which sends a tax collector into chancery is very significant in itself.

so to distinguish the case, and it is significant that a later decision by the same court may have the effect of broadening even the holding of this case.[15]

Walter DeJ. Coleman

WILLS—NUNCUPATIVE WILLS—WHAT CONSTITUTES "LAST SICKNESS".

S resided near the home of his niece *L*. On July 1, 1936, while visiting her he had a chill after which he was ill continuously until his death. On July 3, his physician diagnosed his case and expressed belief that his condition was not serious. On July 4, *S* stated that he felt "very well" except that he was weak. In conversation he made mention of the large number of deaths of recent occurrence. Testimony reveals that he was in bed, but that he was dressed in his usual daily attire except that his shoes were removed. About 8:30 or 9:00 o'clock he made the following statement in the presence of three witnesses: "Boys, I want you boys here present to listen and witness a statement I am going to make concerning my property in case I die. I am sick and I may die and I may get well, but if I die I want all my property to go to Marvin and Lorena [*L*] . . . I want them to have my property if I die . . ." *S* died two days later. HELD: Decree of lower court denying probate to the alleged will affirmed. *Schmitz v. Summers*, ... Miss. . . . , 174 So. 569 (1937).

By statute[1] the following requirements are essential to the validity of a nuncupative will in Mississippi:

(1) The will must be made in the time of the last sickness of the deceased; (2) It must be made either (a) at the place of decedent's habitation, or (b) where decedent has resided for ten days next preceding death—*unless testator be taken sick away from home and die before returning thereto*; (3) If the value of the property be in excess of $100.00, it must be proved by not less than two witnesses that decedent called upon someone present to take notice that the language uttered is testamentary.

Literally there seems to have been a compliance with the requirements of the statute. The words of the testator were uttered during his last sickness at the place where he was taken ill, and he died before returning to his place of habitation. Therefore compliance with either subdivision (a) or (b) of the second requirement of the statute was unnecessary. The statement was made to three persons specifically requested to bear witness.

However the decision of the court seems to be sound. There is only one phase of the matter that warrants a careful study. The words "last sickness" have retained a legal ambiguity since the adoption of the statute. Since no statutory definition of the term "last sickness" has been given, any attempt to comprehend its meaning must come from a study of judicial interpretations.[2] The fact that the words carry no definite or fixed meaning and that their significance has been determined by such construction as courts have seen fit to

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[15]State *ex rel.* Rice v. Allen, 177 So. 763 (Miss. 1938). Here, it was held that equity should entertain a suit by the attorney-general and grant a preliminary mandatory injunction requiring a retail merchant to collect the sales tax from his customers. The fine imposed by the statute for its violation was held not to provide the state an adequate remedy at law.

[1]MISS. CODE (1930) § 3556.

[2]See 1 PAGE, WILLS (1928) § 375.

place upon them would indicate that they are given varied meanings by the different jurisdictions. However, there can be no doubt but that "last sickness" must be the illness of which the afflicted actually died, because recovery after a parol testamentary utterance renders its testamentary power inoperative and void. Too, it is usually held that the words do not include the early or intermediate stages of a disease even though it is eventually fatal to the alleged testator.[3] This is probably the result of Chancellor Kent's opinion in *Prince v. Hazelton*,[4] which very emphatically narrowed the meaning of the words to include only the last hours of sickness of one *in extremis*. The court justified its conclusion because of the opportunities for fraud in making nuncupative wills. Following this decision the majority of courts have held that the term must be confined to an acute disease or the last stages of a chronic disorder.[5] However, the mere fact that testator has knowingly been the victim of a chronic disorder that must eventually prove fatal and that he has with a realization of this fact postponed the execution of a written will until such opportunity has expired does not deprive him of the power to execute a nuncupative will.[6]

There are courts which hold that since no particular meaning is attached to the term "last sickness" they are at liberty to hold a nuncupative utterance valid if the disorder has progressed to a stage that death is expected and in fact does follow.[7] They do not require that testator have no hope of recovery if death actually follows.[8]

There is a conflict as to whether or not the elapse of a sufficient length of time to execute a written will subsequent to the nuncupative utterance will render such testamentary effort void.[9] Some states clearly hold that the acquisition of sufficient strength after the nuncupative utterance to execute a written will does not invalidate the utterance then in force.[10] Certain dicta of the Mississippi court would indicate that such would be fatal in this state.[11]

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[3]Harp v. Adams, 142 Ga. 5, 82 S. E. 246 (1914); Sadler v. Sadler, 60 Miss. 251 (1882); Donald v. Unger, 75 Miss. 294, 22 So. 803 (1897); Carrol v. Bonham, 42 N. J. Eq. 625, 9 Atl. 371 (1887); Mellor v. Smyth, 220 Pa. 169, 69 Atl. 592 (1908). See 1 PAGE, WILLS (1928) § 375.

[4]20 Johns. 502 (N. Y. 1822).

[5]For compilation of authorities on this point, see Note (1907) 13 L. R. A. (N. S.) 1092. The views there set forth are (1) that testator be *in extremis*, apparently the majority rule; (2) that the disease has progressed to a state that death is expected and does follow; and (3) that the condition is met if testator merely supposes that he is in his last sickness at the time the will is uttered.

[6]Harp v. Adams, 142 Ga. 5, 82 S. E. 246 (1914). But see McClellan's Estate, 189 Atl. 315, 318 (Pa. 1937), where the following language appears: "[The statute requires] that the nuncupation take place in such extremity of the testator's last sickness as to preclude the making of a written will. This means that his last sickness has come upon him so suddenly and unexpectedly that he has not time or opportunity to have his testamentary wishes reduced to writing."

[7]Johnston v. Glasscock, 2 Ala. 218 (1841); Harrington v. Stees, 82 Ill. 50 (1876); Nolan v. Gardner, 7 Heisk. 215 (Tenn. 1872); *In re* Miller's Estate, 47 Wash. 253, 91 Pac. 967 (1907). See also UNDERHILL, WILLS (1900) § 171.

[8]Harrington v. Stees, 82 Ill. 50 (1876).

[9]See 1 PAGE, WILLS (1928) § 375.

[10]Johnston v. Glasscock, 2 Ala. 218 (1841); Harrington v. Stees, 82 Ill. 50 (1876); Nolan v. Gardner, 7 Heisk. 215 (Tenn. 1872).

[11]See Lee v. Barrow, 156 Miss. 711, 716, 126 So. 648, 649 (1930), where the

Of course, even though it be shown that the words were uttered in the last illness of the decedent, it must also be proved that he intended the very words uttered, and no others, to constitute his will.[12] It must be the words themselves that make the will and it will not suffice that they were the basis from which a will was to have been drawn. The testator at the time of utterance must have a *present* testamentary intention. The fact that parol words could not be reduced to writing before testator's death does not alter the rule.[13] However, an utterance made without anticipation of death although testator actually dies shortly thereafter does not constitute a valid nuncupative will.[14]

In all previous Mississippi cases either the testator was not clearly *in extremis* or an attempt was made to probate last minute instructions for the execution of a written will but the attempt was cut short because of testator's death.[15] The present case thereby furnishes the first occasion for the court to actually hold that "last sickness" requires that testator be *in extremis*. In fact it is obvious that the testator was far from a state of extremity, and therefore the court might yet require a greater degree of disability than was here present but which does not reach a state of extremity and hold a will uttered thereunder to be valid. Thus it is seen that the court has not yet definitely

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court, in defining nuncupative will, includes the requirements that the testator be "*in extremis* or overtaken by sudden and violent illness *and has not time or opportunity to make a written will.*" Italics supplied.

[12]Donald v. Unger, 75 Miss. 711, 22 So. 803 (1897); Lee v. Barrow, 156 Miss. 711, 126 So. 803 (1930); *In re* Hebden's Will, 20 N. J. Eq. 473 (1869); *In re* Male's Will, 49 N. J. Eq. 266, 24 Atl. 370 (1892); Porter's Appeal, 10 Pa. 254 (1849).

[13]Cases cited note 12, *supra*.

[14]*In re* Rutt's Estate, 200 Pa. 549, 50 Atl. 171 (1901).

[15]The cases involving this point which have been considered by the Mississippi court are as follows:

Parkison v. Parkison, 12 Smed. & M. 672 (Miss. 1849). Testator was so low that upon expression of his desire to make testamentary disposition of his property his physician advised him that he would not live long enough to have a will written. Held, requirements having been otherwise met, memorandum prepared by witness does no harm though it adds nothing to give strength to the will.

Lucas v. Goff, 33 Miss. 629 (1857). Testator declared that he wished to make a will but that it was too late because he could not make a written will, but that he wished his property to be distributed in a specified manner. Held, *animus testandi* was not established and the utterance was void as a nuncupative will.

Andrews v. Andrews, 48 Miss. 220 (1873). Probate was denied because testamentary capacity of deceased and *animus testandi* at the time of the nuncupation were not proved. See also Broach v. Sing, 57 Miss. 115 (1879), on same point.

Sadler v. Sadler, 60 Miss. 251 (1882). Court held last sickness to have no application to lingering disease but expressly refused to define the term.

Donald v. Unger, 75 Miss. 294, 22 So. 803 (1897). Testatrix had been sick three months. Three weeks before death she was told that she could not recover. Directions for making of a will were given but execution was put off until she could not sign. Held, the matter did not constitute a valid nuncupative will.

Lee v. Barrow, 156 Miss. 711, 126 So. 648 (1930). Statement was written by nurse at direction of testator and was held not to constitute valid execution of a written will. Held, the declaration made by testatrix constitutes the will if any; the written form cannot be used as a nuncupative will.

committed itself. In *Donald v. Unger*[16] the court expressly refused to define the term and refused probate "because [testatrix] is not shown by the clearest and most indisputable evidence . . . to have spoken the words in her 'last sickness', . . . and because verbal instructions for drawing up a written will cannot be admitted to probate as a nuncupative will."

Bruce Aultman

[16]75 Miss. 294, 297, 22 So. 803, 804 (1897).

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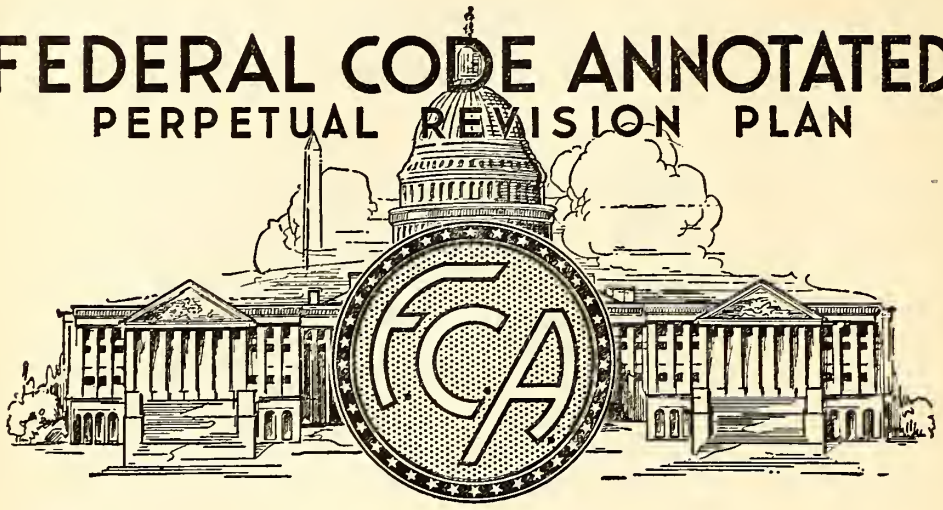

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